Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IRVING T. SCHWARTZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Do the principles of fundamental fairness prohibit the United States from retaining a criminal, in personam forfeiture under the RICO statute, without a valid conviction?

2. Do the principles of fundamental fairness demand that an innocent owner who is subjected to a criminal forfeiture under RICO be afforded the same right of due process of law as afforded to criminal defendants?

3. Do the principles of fundamental fairness require that an innocent owner who is subjected to a void order of

RICO forfeiture be afforded the same rights and remedies as afforded to criminal defendants?

4. Did the lower courts violate the principles of justice incorporated in F.R.C.P. 60(b) by refusing to vacate Petitioner's stipulation to a criminal RICO forfeiture after the underlying RICO conviction was declared void ab initio?

LIST OF THE PARTIES

The Petitioner, Irving T. Schwartz, seeks review of the judgment entered in a consolidated appeal before the United States Court of Appeals for the Fourtch Circuit which was designated as Appeal No.s 90-6043, 90-6061 and 90-6162. The parties to the consolidatd appeal were Petitioner-Appellant, Irving T. Schwartz and Respondent-Appellee, United States of America.

The caption of Appeal No. 90-6043 and No. 90-6061 retained the names of the parties in the criminal case of United States v. Marvin Mandel et al., Criminal No. Y-75-0822 (D.Md.). However, the defendants in the criminal case, including Marvin Mandel, W. Dale Hess, Harry W. Rodgers, III, William A. Rodgers, Ernest N.

Cory, Jr., and Irvin Kovens (since deceased), were not parties to the appellate proceedings from which Irving Schwartz now seeks review.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF JURISDICTION

The instant Petition involves three cases which were filed in the United States District Court for the District of Maryland. United States v. Marvin Mandel et al., (D.Md. Criminal No. 75-0822); Irving T. Schwartz v. United States of America, (D.Md. Civil No. Y 81-350); Irving T. Schwartz v. United States of America, (D.Md. Y 90-602). The jurisdiction of the District Court was based upon the provisions of 18 U.S.C. § 3231, 18 U.S.C. § 1963(b) (1970 version) (Added Pub. L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943), 28 U.S.C. § 1346, 28 U.S.C. § 2201 and 28 U.S.C. § 2202.

The District Court entered three final decisions adverse to Petitioner Schwartz. Specifically, by Order and Memorandum, dated January 25, 1990, the District Court denied Petitioner's Motion To Vacate Judgment And

For Return Of Forfeited Property. By Order and Memorandum, dated March 27, 1990, the District Court also denied Petitioner's Amended Motion To Vacate Judgment And For Return Of Forfeited Property. And upon the United States' Motion To Dismiss Plaintiff's Complaint, Or In The Alternative, Motion For Summary Judgment, the District Court entered an Order and Memorandum, dated August 30, 1990, denying Petitioner Schwartz' Complaint For Declaratory Judgment.

From each of these adverse decisions, Petitioner Schwartz timely filed an appeal to the United States Court of Appeals for the Fourth Circuit. The appeals, designated as Appeal No.s 90-6043, 90-6061 and 90-6162, were consolidated by the Fourth Circuit. The jurisdiction of the Fourth Circuit was based upon the provisions of 28 U.S.C. § 1291. By published opinion, dated

September 28, 1992, the Fourth Circuit affirmed the orders and judgments of the District Court.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The text of the constitutional provisions, statutes and regulations involved in this case are reprinted in pertinent part in the Appendix and designated as Appendix A, as follows:

> Constitution of the United States,
> U.S. Const. amend.V.
>
> The Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1963 (1970 version) (Added Pub. L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943)
>
> The Racketeer Influenced and Corrupt Organization Act (1984 Version) (As amended by Pub. L. 98-473, Title II, §§ 302, 2301 (a) -(c), Oct. 12, 1984, 98 Stat. 2040, 2192).
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> The Racketeer Influenced and Corrupt Organization Act (1984 version) Legislative History reprinted in 1984 U.S. Code Cong. & Ad. News 3388-3392.
>
> The Federal Rules of Civil Procedure, Rule 60(b) (4) (5) and (6).

STATEMENT OF THE CASE

Introduction

Petitioner, Irving Schwartz' shares of stock in Southern Maryland Agricultural Association ("S.M.A.A.") were forfeited to the United States of America as an in personam criminal penalty against Irving Kovens in a case to which Schwartz was not a party.

Specifically, Irving Schwartz' property was forfeited in the course of the highly publicized, criminal prosecution of former Governor of Maryland, Marvin Mandel and five co-defendants including Irvin Kovens (collectively referred to as the "Mandel defendants"). U.S. v. Mandel, et al., (D.Md. Criminal No. 75-0822). This case has spanned a period of seventeen years. In the process, two federal statutes have been amended as a direct and indirect result of

this case. Therefore, the facts of this unusual case must be placed in their historical context.

The Mandel defendants were indicted in 1975 in the United States District Court for the District of Maryland. With prosecutorial zeal, the United States pursued the novel "intangible rights theory" to convict the Mandel defendants under the 1970 version of the federal mail fraud statute, 18 U.S.C. § 1341. With that predicate offense, the United States unleashed against the defendants the tough measures of the recently enacted Racketeer Influenced and Corrupt Organization chapter of the Organized Crime Control Act of 1970 ("RICO"), 18 U.S.C. § 1961 et seq. (Added Pub. L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 94). Moreover, the RICO statute, as originally enacted mandated the forfeiture of property to the United States

as an in personam RICO forfeiture. 18 U.S.C. § 1963 (1970 version) (reprinted in Appendix A).

However, Irvin Kovens, by his attorney, flatly denied that he held any interest in Schwartz' S.M.A.A. stock. Indeed, to this day, neither Irvin Kovens, who is now deceased, nor his estate, have ever asserted an ownership interest in Schwartz' stock. Nonetheless, pursuant to the United States' nominee theory, Schwartz was subjected to a criminal punishment, without a single right afforded to a criminal defendant. Irving Schwartz was subjected to multiple orders to forfeit his property under the original version of Section 1963 of RICO. 18 U.S.C. § 1963.

As originally enacted, the RICO statute was unconstitutional. It lacked any procedural or substantive provisions to safeguard the rights of innocent owners,

such as Irving Schwartz. Although the RICO statute was poorly drafted, even the artistic eye of the District Court could not look at this muddled statute and, in truth, find any provision for the due process rights of innocent owners. Even the basic right to be heard was clearly omitted.

Irving Schwartz repeatedly raised constitutional challenges to the RICO statute, which the District Court simply would not address. Instead, Irving Schwartz was forced to undergo a tortuous process whereby the District Court wrote and rewrote its own RICO procedure which Schwartz was required to follow only to be told that the procedure had again been revised. These endless procedural hurdles, in and of themselves, constituted a further violation of Irving Schwartz' right to be heard in a timely and meaningful manner.

Irving Schwartz spent over eight years in this procedural maze, filing four separate claims and two appeals. Even then, the district judge still had not drafted the omitted RICO provisions as to the substantive rights of innocent owners.

Instead, after eight years, the district judge, in essence, suggested that the procedures were meaningless, for he seriously doubted that the forfeiture of the property of an innocent owner would be unconstitutional. Again, the district judge refused to decide the constitutionality of the RICO statute, for there were still more alternative procedures for Schwartz to follow.

In the meantime, the Mandel defendants had completely exhausted all available appeals. The RICO convictions were conclusively affirmed. At that point,

Irving Schwartz entered a settlement agreement with the Government, agreeing to a 60% criminal forfeiture of his stock.

Within less than nine months of the settlement agreement, Section 1963 of RICO was amended. After stalling endlessly, the United States Department of Justice conceded that the actual statutory provisions of RICO to which Schwartz had been subjected did not comport with the fundamental principles of due process of law. With the aid of the Department of Justice, Section 1963 of RICO was amended by literally copying the final version of the procedures which were written by the district judge in Irving Schwartz' case.

PROCEDURAL HISTORY

Convictions of the Mandel defendants and the ensuing forfeiture

In 1975, soon after the enactment of RICO, the United States sought the conviction of the Mandel defendants. By indictment returned in November, 1975, United States v. Marvin Mandel, et al., Criminal No. 75-0822, the United States charged, inter alia, that the Mandel defendants violated the 1970 version of the mail fraud statute, 18 U.S.C. §1341. The United States prosecuted the Mandel defendants under the relatively novel theory that the defendants allegedly defrauded the citizens of Maryland of their intangible right to honest government, purportedly in violation of the mail fraud statute.

The alleged violation of the mail fraud statute was the predicate offense upon which the United States based its further charge that the Mandel defendants had conducted and participated in the conduct of affairs of Marlboro Race Track through a pattern of racketeering activity in violation of the original 1970 version of RICO, 18 U.S.C. §1962.

The United States also charged that all interests in the Marlboro Race Track held in the form of S.M.A.A. stock were subject to forfeiture pursuant to Section 1963 of RICO. See 18 U.S.C. 1963(a) (1970 version) Added Pub. L. 91-452, Title IX §901(1), Oct. 15, 1970, 84 Stat. 943) (reprinted in Appendix A).

The RICO forfeiture provision was unparalleled in modern law. By the provisions of Section 1963, Congress created a broad sweeping, mandatory sanction in the

form of an in personam forfeiture of property -- a type of forfeiture which had not been imposed in nearly two centuries, having been abolished by the First Congress by Act of April 20, 1970. 18 U.S.C. §3563 (as revised); see also S. Rep. No. 91-617, 91st Cong., 1st Sess., 79-80 (1969) (According to the comments of the Department of Justice on the proposed Organized Crime Control Act, from 1790 to 1970, no federal statute provided for a penalty of forfeiture as a punishment for violation of a criminal statute.).

What was all the more unusual in this case, however, was that the United States sought the RICO forfeiture of Petitioner Schwartz' S.M.A.A. stock under the theory that defendant Irvin Kovens held an indirect interest in the stock through Schwartz as nominee. Yet, Schwartz was not named as a defendant by the United States, nor was he

identified in the averments of the indictment as an unindicated co-conspirator. As a result of the unprecedented posture of this case, Irving Schwartz was compelled to testify at the criminal trial, to suit the United States' purposes of obtaining a forfeiture, while at the same time, Schwartz was denied any corresponding right to provide additional testimony or evidence on his own behalf.

On August 23, 1977, the jury returned a verdict of guilty as to all of the Mandel defendants. Each of the defendants, except Irving Kovens, stipulated to the forfeitures of their shares in S.M.A.A. Immediately, thereafter District Judge Robert L. Taylor, who presided at the trial, instructed the jury, by its foreman, to sign a special verdict form containing the United States' pre-worded statement that "We find that Kovens owns 240,765 number of shares in

Southern Maryland Agricultural Association, Inc. through Irving T. Schwartz, as nominee."

On October 7, 1977, Judge Taylor entered an Order of Forfeiture against those defendants who were titleholders of S.M.A.A. stock and Irvin Kovens to be effectuated within thirty days. Judge Taylor in his order further provided that "all interested parties . . . must show cause, if any they may have, on or before twenty (20) days from this date, as to why the forfeitures ordered herein should not be finally effectuated."

Schwartz' pursuit of claim to S.M.A.A. stock

As it turned out, Judge Taylor's show cause provision of his Order of Forfeiture of October 7, 1977 did not actually provide Schwartz with an opportunity to be heard. On October 26, 1977 Irving Schwartz did, in fact, timely

file a pleading captioned Claim of Owner to Portion of Property Described in Government's Petition for Order of Forfeiture and a separate Show Cause Response. Schwartz set forth his rightful ownership of the S.M.A.A. stock and challenged the Order of Forfeiture as depriving him of his property without due process of law. Schwartz further challenged, as fundamentally unfair, a process whereby he would be bound by the proceeding in the criminal trial to which he was not a party. The United States did not respond to Irving Schwartz' claim at that time. And Judge Taylor did not determine the merits of Schwartz' claim.

Instead, on November 4, 1977, the United States filed a petition for a restraining order to prohibit the transfer of any interest in S.M.A.A. held by the Mandel defendants and Irving Schwartz. At

the hearing which Judge Taylor conducted on December 12, 1977, Irving Schwartz again raised the issue of his due process rights. However, Judge Taylor decided that he would not rule on that issue or any other issue pertaining to Irving Schwartz. Instead, Judge Taylor converted Schwartz' claim into a civil action and reassigned the case to Senior District Judge Joseph H. Young.

Specifically, by Order and Memorandum issued on December 12, 1977, Judge Taylor stated that: "The Court is of the opinion that the issue raised by petitioner Schwartz would be better handled by the Judge who is assigned to deal with the forfeiture in a civil proceeding." Nonetheless, Judge Taylor ordered Irving Schwartz and the Mandel defendants who were stockholders to surrender their stock certificates to the Clerk of the Court to be held in escrow and

further prohibited the sale or hypothecation of the stock without written permission by the court.

Thereafter, on December 21, 1977, Schwartz filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit from the Order of Judge Taylor entered on December 12, 1977. On March 10, 1978, the Fourth Circuit granted the United States' motion to dismiss Schwartz' appeal, holding that Judge Taylor's Order of December 12, 1977 did not constitute a final and appealable order under 28 U.S.C. § 1291.

While Irving Schwartz' appeal was pending, the United States finally filed on January 16, 1978, a response to Irving Schwartz' claim. Irving Schwartz continued to oppose the forfeiture on due process

grounds by filing on January 30, 1978 a reply memorandum opposing the government's petition for forfeiture.

Thereafter, Judge Young who had been assigned the handling of the proceedings regarding Irving Schwartz' stock, stayed all action during the pendency of the appeals from the convictions of the Mandel defendants. On July 20, 1979, the Fourth Circuit rendered a decision which had the effect of affirming the convictions. Subsequently, on November 1, 1979, the appellate court denied a petition for rehearing en banc filed on behalf of the Mandel defendants. A petition for writ of certiorari filed with this Court was ultimately denied on April 14, 1980. United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) vacated, 602 F.2d 653 (4th Cir. 1979)

(en banc), second reh. en banc denied, 609 F.2d 1076 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980).

Approximately nine months later, Judge Young entered a Memorandum Opinion and Order, dated January 21, 1981, declaring Irving Schwartz' S.M.A.A. stock forfeited to the United States, but staying the effect of the forfeiture. United States v. Mandel, 505 F.Supp. 189 (D.Md. 1981). Still, Judge Young would not address the merits of Irving Schwartz' due process claim. Instead, Judge Young held that it was mandatory for Irving Schwartz to file a petition for remission or mitigation of the forfeiture to the Attorney General of the United States, after which he could file some sort of undefined, independent declaratory action.

This procedural format, however, was no more than a shell which did not contain any substantive legal rights for Irving

Schwartz. Neither Congress nor the Attorney General had promulgated any procedural remedies for remission or mitigation in the context of an in personam RICO forfeiture. Indeed, the drafters of RICO had expressly left the issue undetermined whether the customs law of remission or mitigation were even applicable to or consistent with RICO. 18 U.S.C. § 1963(c) (1970 version). Although Judge Young in no manner filled in the substantive void, he nonetheless ordered that it was mandatory for Irving Schwartz to follow a procedure, without any substantive meaning.

Likewise, the so-called right afforded Irving Schwartz to bring an independent declaratory action was illusory as well. Judge Young created the action based upon the RICO provision stating that after the remission or mitigation proceeding, "[t]he United States shall dispose of all such

property as soon as commercially feasible, making due provision for the rights of innocent persons. 18 U.S.C. § 1963(c). As to what legal standards would fill this empty shell of an action, the RICO statute certainly provided no clue.

It was absolutely clear, however, that Judge Young definitely would not be providing Irving Schwartz with a truly independent right to be heard. Indeed, in Judge Young's Memorandum Opinion of January 21, 1981, he strongly stated, in dicta, that it was extremely unlikely that the so-called independent declaratory action would be a right of any substance at all. Judge Young indicated that only if it were proved that the Attorney General applied the remission and mitigation laws in an unconstitutional manner, then "some exercise of judicial discretion might prove proper". But even

then, Judge Young doubted that the forfeiture of the property of an innocent owner would be unconstitutional.

Nonetheless, on February 20, 1981, Irving Schwartz filed a Petition for Remission or Mitigation of Forfeiture pursuant to 18 U.S.C. § 1963(c) (1970 version) and 28 C.F.R. §§ 9.1 to 9.7. Simultaneously, on February 20, 1981, Schwartz filed suit for a declaratory judgment in the U.S. District Court of Maryland under the provisions of 28 U.S.C. § 2201 and § 2202, as well as § 1346 and § 1355, challenging, inter alia, the constitutionality of the RICO statute and the validity of the forfeiture. Irving T. Schwartz v. United States of America, Civil No. Y-81-350 (D.Md.). At the same time, Schwartz also timely renewed his appeal to the Fourth Circuit from the order of forfeiture of Judge Young entered on

January 21, 1981. Irving T. Schwartz In The Case Of United States v. Marvin Mandel, Appeal. No. 81-1198.

The Attorney General waited over fourteen months until May 6, 1982, at which point he denied Schwartz' petition, without having conducted any additional investigation or hearing any new evidence. On March 15, 1983, the Fourth Circuit affirmed Judge Young's order of forfeiture of January 21, 1981 and remanded the case for further proceedings, including consolidation of Irving Schwartz' claim in Criminal No. 75-0822 and the declaratory action, Civil No. Y-81-350. On remand, the issues remained to be decided as to what, if any, substantive procedural rights and legal rights would be afforded to Irving Schwartz.

At that juncture, Irving Schwartz entered a settlement agreement with the United States on February 2, 1984. Under

the terms of the agreement, sixty percent (60%) of the shares of stock were allocated to the United States as an in personam RICO forfeiture against Irvin Kovens, while the remaining forty percent (40%) of the shares were allocated to Irving Schwartz.

In the meantime, Judge Young filed a Memorandum on March 20, 1984, holding, inter alia, that the United States was not required to "reprove its case of Kovens' ownership [of the stock]" but that "Schwartz must prove by a preponderance of the evidence that he -- not Kovens -- was the owner of the S.M.A.A. stock."

Thereafter, on March 26, 1984, Judge Young entered an Order in U.S. v. Mandel, et al., Criminal No. 75-0822, approving the settlement agreement in satisfaction of the RICO forfeiture, "specifically an Order entered on October 7, 1977 by District Judge Robert L. Taylor and an Order entered by

District Judge Joseph H. Young on January 21, 1981 . . . ". At that time, S.M.A.A. was under a plan of liquidation and, therefore, Judge Young implemented the settlement agreement by ordering an appropriate monetary distribution upon the dissolution of S.M.A.A.

On October 12, 1984, after the settlement agreement was entered, Congress amended the RICO forfeiture provisions of 18 U.S.C. § 1963. (Amended Pub. L. 98-473, Title II, Ch. III, Part A, § 302, Ch. XXIII Subtitle D, § 1153 (a), Oct. 12, 1984, 100 Stat. 3207-13.) (reprinted in Appendix A). As set forth in the accompanying comments, the Department of Justice dramatically altered its position to join in the severe criticism of the entire RICO system to which Schwartz less than a year before had been subjected. The Department of Justice finally admitted that it was improper to

limit an innocent owner to a discretionary administrative remedy of mitigation and remission from a presumptively valid RICO forfeiture. The fundamental principles of due process demanded that an innocent owner be entitled the right to directly challenge the validity of the forfeiture, itself -- a right which was denied to Irving Schwartz. See Legislative History reprinted in 1984 U.S. Code Cong. & Ad. News 3390-3391. (reprinted in Appendix A).

Later challenge to convictions by Mandel defendants

In 1987, counsel for Marvin Mandel and his co-defendants petitioned the District Court of Maryland for writs of error coram nobis to vacate their judgments of conviction, relying upon the recent decision of this Court in McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875 (1987). In a Memorandum entered on November 12, 1987,

District Judge Frederic N. Smalkin held that the mail fraud statute, 18 U.S.C. § 1341, did not extend to the prosecutorial use made of it in United States v. Mandel, et al., that is, allegedly defrauding the citizens of Maryland of their intangible right to honest government. Judge Smalkin held that the convictions of the defendants, including Irvin Kovens, were void ab initio. Judge Smalkin further noted "that, through a writ of error coram nobis, it may not only vacate a conviction, but it may also order repayment of any fines received by the Government in connection with said conviction." "The Government, indeed, has stipulated that 'vacating the criminal convictions would result in restitution of any criminal fines in connection therewith . . . .' Paper #640, at 54 n.19." U.S. v. Mandel, 672 F. Supp. 864 (D. Md. 1987).

Shortly thereafter, the defendants who were titleholders of S.M.A.A. stock filed motions to modify Judge Smalkin's order to require the United States to repay the value of the forfeited stock, specifically to W. Dale Hess, Harry W. Rodgers, III and William A. Rodgers. In exchange for the withdrawal of the motions, the United States stipulated to repay the forfeitures upon the affirmance of Judge Smalkin's decision granting the writs of error coram nobis.

Judge Smalkin's ruling was affirmed on appeal to the United States Court of Appeals for the Fourth Circuit on December 7, 1988, in an opinion authored by Circuit Judge H. Emory Widener, Jr. United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988). Thereafter, on June 19, 1989, the United States Supreme Court denied a petition for

writ of certiorari filed on behalf of the United States. United States v. Mandel, 445 U.S. 961 (1989).

Renewed efforts by Schwartz to obtain relief from forfeiture

On October 10, 1989, Irving Schwartz filed a Motion To Vacate Judgment And For Return Of Forfeited Property pursuant to Rule 60(b) of the Federal Rules of Civil Procedure in Civil Action No. Y-81-350. In an Order and accompanying Memorandum, dated January 25, 1990, Judge Young denied Irving Schwartz' Motion. (reprinted in Appendix B). Irving Schwartz filed a timely Notice of Appeal on February 21, 1990.

On February 20, 1990, Irving Schwartz filed an Amended Motion To Vacate Judgment And For Return Of Forfeited Property which was also denied by Judge Young in an Order and Memorandum, dated March 27, 1990.

(reprinted in Appendix B). Irving Schwartz filed a timely Amended Notice of Appeal on April 16, 1990.

On February 22, 1990, Irving Schwartz further filed a Complaint for Declaratory Judgment and Ancillary Relief, Including Damages in the case styled "Irving T. Schwartz v. United States of America, Civil No. Y-90-602." Upon the United States' Motion To Dismiss Plaintiff's Complaint, Or In The Alternative, Motion For Summary Judgment, Judge Young entered an Order and Memorandum, dated August 30, 1990, denying Irving Schwartz' Complaint for Declaratory Judgment. (reprinted in Appendix B). A timely Notice of Appeal was filed by Irving Schwartz on September 27, 1990.

Thereafter, the Fourth Circuit ultimately consolidated the three cases on appeal, by Order, dated November 14, 1990. By published opinion dated September 28,

1992, the Fourth Circuit affirmed the judgments and orders of the District Court. The net effect was that the lower courts refused to vacate the settlement agreement and orders of forfeiture.

REASONS FOR GRANTING THE WRIT

1. Under the basic principles of fundamental fairness the United States should never be permitted to keep a criminal in personam forfeiture, without a valid conviction.

In the broadest sense, this case presents the issue of whether the United States should ever be permitted to keep a criminal in personam RICO forfeiture, without a valid conviction. This issue poses an important question of federal law which has not been, but should be settled by this Court, for it strikes at the core of the principles of fundamental fairness and constitutional due process of law.

Throughout most of the history of American jurisprudence, the concept of a criminal forfeiture has been held repugnant. By Act of April 20, 1970, the First Congress of the United States immediately abolished the use of forfeitures as a form of criminal punishment. 18 U.S.C. § 3563 (as revised). Criminal forfeitures remained abolished for nearly two centuries until the enactment of RICO in 1970. See S. Rep. No. 91-617, 91st Cong., 1st Sess., 79-80 (1969) (According to the comments of the Department of Justice on the proposed Organized Crime Control Act, from 1790 until 1970, no federal statute provided for a penalty of forfeiture as a punishment for violation of a criminal statute.).

The repugnancy of an in personam criminal forfeiture persists today. The RICO forfeiture is ripe with a host of due process problems which the drafters of this

poorly written statute did not bother to address. Among other errors, the RICO statute, as originally enacted and in its current form, omits an explicit provision mandating that the United States return forfeited property when the underlying criminal conviction is subsequently reversed, vacated or otherwise invalidated.

2. This Court has made clear that the United States must return criminal forfeitures to criminal defendants whose convictions are subsequently invalidated.

There is no doubt that, as to a criminal defendant, the law would never permit the United States, pursuant to any statute, to retain a criminal forfeiture, without a valid conviction. Our system of justice would not tolerate the Government keeping the fruits of an erroneously inflicted criminal punishment.

In the context of an *in rem* forfeiture, the point was made clear by this Court in the case of United States v. United States Coin and Currency, 401 U.S. 715 (1971). The majority of the Court affirmed that the United States must return the defendant's forfeited property because the underlying conviction for violating the gambling tax law was retroactively void. 401 U.S. at 724. This Court would not sanction or construe a statute so as to permit a forfeiture against an innocent person. 401 U.S. at 721-722, 724.

Although U.S. Coin and Currency involved an *in rem* forfeiture, the same principle applies with even greater force to a RICO forfeiture which by explicit statutory terms constitutes a criminal punishment. 18 U.S.C. §1963(a). Even the United States would undoubtedly concede that it should be the black letter law of the

land that the government must, at least, return RICO forfeitures to criminal defendants who were erroneously convicted. E.g. United States v. Bethea, 672 F.2d 407, 420 (5th Cir. 1982) ("In view of our reversal of [defendant's] conviction under both of the RICO counts, the order of forfeiture falls as well.").

3. There is no genuine dispute that the United States is required to return a forfeiture to a criminal defendant who pleads guilty and agrees to a penalty pursuant to an indictment which does not state a crime.

So too, the United States does not seriously dispute that it would be required to return a RICO forfeiture to a criminal defendant who pleads guilty to violating RICO pursuant to an invalid indictment which does not state a crime.

Indeed, the Fourth Circuit, itself, has held that a criminal defendant's stipulation or agreement provides the government with no vested right to keep a criminal penalty in which it had no right to impose in the first instance. In analogous circumstances, the Fourth Circuit has held in United States v. Bluso, 519 F.2d 473 (4th Cir. 1975) that a guilty plea and agreement to pay penal fines cannot stand when the underlying indictment is void.

> [I]f, because of an unknown constitutional right a defendant pleading guilty could not, in fact, have been prosecuted at all, and hence received an empty bargain, there is no reason to treat him any differently from a [defendant] who sought no bargain, but went to trial.
>
> * * *
>
> We add that as a matter of policy a principle under which a defendant who can conclusively show that he gained nothing by his plea winds up worse off than one

> who put the government to its proof has little to recommend it.

Id. at 474; DeCecco v. United States, 485 F.2d 372 (1st Cir. 1975) (where the defendant plead guilty to conduct which the United States Supreme Court subsequently held had never been a crime, the guilty plea and the agreement to pay penal fines was void.); see also Brast v. Winding Gulf Colliery Co., 94 F.2d 179, 182 (4th Cir. 1938) (the government could not be prejudiced by vacating an order incorporating plaintiff's stipulation that a certain item could be taxed. "[The government] was only required to refund the sum it had collected, which it had no right to collect.").

4. Under the basic principles of fundamental fairness, an innocent owner who is subjected to a criminal RICO forfeiture is entitled to the same rights and remedy as a criminal defendant.

Thus, the more specific question in this case is whether an innocent owner who is subjected to a criminal RICO forfeiture should be afforded the same rights and remedies as a criminal defendant. There is little, if any, case precedent which addresses this issue. Moreover, this important question of federal law has not, but should be settled by this Court, due to the flaw in the RICO forfeiture statute which creates serious risks of criminal punishment of innocent owners.

The RICO forfeiture is uniquely different than in rem forfeiture. The concept of an in rem forfeiture is premised upon the fiction that the property is guilty

of some wrong. Moreover, in rem forfeiture statutes typically provide for a civil action against the property.

Yet even in the in rem context, this Court has recognized the overtones of criminal punishment and therefore the importance that punishment be imposed only upon persons who are significantly involved in a crime. In U.S. Coin and Currency, this Court made clear that the United States Constitution would not permit an in rem forfeiture in its original, feudal form. In the words of this Court:

> *** [W]e would first have to be satisfied that a forfeiture statute, with such a broad sweep, did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person be "deprived of *** property, without due process of law, nor shall private property be taken for public use, without just compensation." Even Blackstone, who is not known as a biting critic of the English legal tradition,

> condemned the seizure of the property of the innocent as based upon a "superstition" inherited from the "blind days" of feudalism. And this Court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment.

401 U.S. at 720-721 (citations omitted).

The rights of the innocent are even more compelling in the RICO context. For the RICO forfeiture provision is neither premised upon a legal fiction nor provides for a civil action. By its statutory makeup it is manifest that the RICO statute inflicts criminal punishment against people. Therefore, it is at once apparent that innocent owners should be afforded the same standards of criminal due process as are afforded to criminal defendants.

The best rule to achieve this result would be to outright prohibit a RICO forfeiture against a person who is not convicted of a crime. The RICO system cannot be sanctioned when the due process rights of persons subjected to criminal punishments are arbitrarily determined by whether the prosecutor names the punished one as a criminal defendant or a nominee. There is no just reason for relieving the government of its burden of proving beyond a reasonable doubt that the owner alleged to be a nominee acted in that capacity as a principal to a crime. The use of the nominee theory against innocent owners should be abolished.

If the government is allowed to use the nominee theory in a criminal trial to which the alleged nominee is not a party, then, at the very least, the alleged nominee should be afforded the same remedy as afforded to

any criminal defendant when the indictment and/or conviction proves to be invalid. The government cannot possibly justify its keeping a criminal forfeiture when no crime has been committed by anyone at all. It should be an absolute rule that the government must return criminally forfeited property when it lacks a valid indictment or conviction. Otherwise, the government is blatantly punishing innocent people.

Even the Fourth Circuit would not go so far as to hold that the United States should have the unfettered right to keep the property of innocent owners when the underlying RICO conviction has been declared void. On this point the United States has also been conspicuously silent. For such a rule is simply repugnant to any sense of fair play and justice.

Instead, the Fourth Circuit, in essence, made an exception to allow the United States to keep the forfeited property of innocent owners who settle their claim with the government. Bluntly stated, the exception makes no sense.

The Fourth Circuit did not explain why an innocent owner who agrees to a criminal forfeiture when there has been no crime should have less rights than a criminal defendant who agrees to a criminal forfeiture pursuant to an invalid indictment which does not state a crime. The criminal defendant, had, at least, been provided with the opportunity to challenge the criminal charges against him before he pled guilty and agreed to a penalty. By contrast, the arbitrariness of the RICO system results in the innocent owner being denied any means or opportunity to directly challenge the validity of the RICO conviction pursuant to

which he is erroneously punished. How then can it be said that by settling a claim an innocent owner waived a right that the RICO statute unconstitutionally deprived him of in the first instance.

The Fourth Circuit nonetheless seems to suggest that a settlement agreement with an innocent owner somehow vests the United States with some irrevocable property right as if it were an in rem forfeiture of days of old. In so holding, the Fourth Circuit has committed fundamental legal error. Undisputedly, the RICO statute imposes a criminal penalty. And no one should be subjected to a criminal punishment when it has been conclusively declared that there has been no crime.

5. The lower courts ignored the principles of fundamental fairness incorporated in F.R.C.P. 60(b) by refusing to vacate the settlement agreement which was predicated upon the void order of forfeiture and obtained in violation of Petitioner's right to due process of law.

The provisions of Rule 60(b) of the Rules of Civil Procedure provide a means by which to vacate the orders of forfeiture and settlement agreement. The Rule provides in pertinent part that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: .... (4) the judgment is void; (5) ... a prior judgment upon which [the judgment, order, or proceeding sought to be vacated] is based on or has been reversed or otherwise vacated ...; or (6) any other reason justifying relief from the operation of the judgment. ***

In the past the Fourth Circuit, like other federal circuits, has recognized that Rule 60(b) ultimately involves a balancing of interest test. The ultimate interests which must be balanced are "the sanctity of final judgments expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of all the facts." Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979) (citations omitted). See also Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981) ("[I]t is often said that the rule should be liberally construed in order to do substantial justice."); Acha v. Beame, 438 F.Supp. 70, 75 (S.D.N.Y. 1977) (the fact that a case is unique, and therefore does not neatly fit within the subsections of Rule 60(b), is not a proper ground to deny relief. "[E]ach case is unique and procedural rulers must be

interpreted so as to achieve justice. The continued growth and viability of our common law demands no less.").

Nonetheless, in this case, the District Court and the Fourth Circuit denied Irving Schwartz any remedy by an extremely narrow interpretation of Rule 60(b)(4), (5), and (6). Although Irving Schwartz continues to contend that the lower court's interpretation of Rule 60(b) constitutes legal error, the real heart of the matter presents more significant questions of fundamental justice and constitutional due process of law.

In this case, the principles of justice commanded that the order of forfeiture and the settlement agreement be vacated. Irving Schwartz was subjected to multiple orders of forfeiture pursuant to the original 1970 version of RICO which was blatantly unconstitutional. As originally enacted,

Section 1963 mandated RICO forfeiture upon conviction, without any regard for innocent owners who could be mistakenly penalized.

Moreover, the RICO forfeiture provisions were applied in an especially egregious manner that deprived him of any semblance of due process of law. The necessary factual elements to support the RICO forfeiture of Irving Schwartz' property were determined at the criminal trial to which he was not even a party. Due to the odd posture of the case, the determination that a RICO offense had been committed was completely out of Irving Schwartz' hands. Nor was Irving Schwartz afforded any right to be heard to establish that he was the rightful owner of the S.M.A.A. stock.

As a result, the fact-finding process was seriously flawed. Irving Schwartz was compelled to testify at the criminal trial to suit the United States' purpose of

obtaining the forfeiture of his property, without being afforded any independent right to provide additional evidence on his own behalf. Yet on the basis of this one-sided evidentiary record, the trial judge instructed the jury to sign a special verdict form containing the United States' pre-worded statement that Irving Schwartz did not own the stock but was a nominee for the owner Irvin Kovens. At that point, the RICO forfeiture of Irving Schwartz' property was absolutely mandatory under Section 1963 of RICO.

Under the 1970 version of RICO, Irving Schwartz was denied any right to overturn the forfeiture, itself. Indeed, the RICO statute did not provide Irving Schwartz with any legal rights at all. Instead, Section 1963 (c) only provided for the mere possibility of remission or mitigation under the custom laws "insofar as applicable and

not inconsistent with RICO." 18 U.S.C. § 1963 (c) (1970 version). The custom laws, which pertain to in rem forfeitures are not applicable to the criminal penalties imposed by RICO. The customs laws only provide for the highly discretionary, equitable remedy of remission or mitigation to ameliorate the effect of the order of forfeiture, which nonetheless would forever stand. Any judicial review is narrowly limited to determining whether there has been an abuse of administrative discretion.

Obviously, this statute was unconstitutional. To strip a person of all legal rights while subjecting him to a criminal penalty is outrageous. Yet Judge Taylor and Judge Young would not even address Irving Schwartz' repeated challenges to the constitutionality of the 1970 RICO statute.

Instead, Judge Young stepped far outside the bounds of his judicial authority and literally rewrote the RICO statute in an attempt to save it from its patent unconstitutionality. This process of judicial legislation took over eight years, which, in and of itself, constituted a deprivation of Irving Schwartz' right to be heard in a timely and meaningful manner. Irving Schwartz was subjected to endless procedural hurdles, without knowing when, if ever, the district judge would determine the substantive standards.

It was in this context that Irving Schwartz settled his claim with the Government. Judge Young then entered an order for 60% of the stock to be forfeited to the United States as a criminal RICO penalty.

And then after Schwartz spent all those years being denied his basic constitutional rights, the convictions of the Mandel defendants, including Irvin Kovens, were declared void ab initio. The United States had absolutely no legal basis to subject Irving Schwartz to a criminal forfeiture. No crime had been committed by anyone. Irving Schwartz should never have been subjected to the RICO system at all. From the time of the invalid indictment, all of the proceedings which followed had simply been an enormously prolonged and grievous error.

The United States returned the forfeitures to the Mandel defendants who were title-holders of S.M.A.A. stock. The fact that the criminal defendants had stipulated to the forfeiture of their shares of stock did not matter at all. Yet by a contorted interpretation of Rule 60 (b) the

District Court and the Fourth Circuit held that Irving Schwartz' settlement agreement should stand. In the process the lower courts established a rule of law which produces an anamolous result whereby an undisputedly void order of forfeiture is void only as to criminal defendants and valid as to innocent owners -- a concept which lacks any roots in the basic principles of justice.

For the Fourth Circuit to affirm the District Court's denial of Irving Schwartz' motion to vacate serves to sanction an order of forfeiture which is undisputably void ab inito, to sanction the 1970 RICO statute which was undisputably unconstitutional and to sanction the District Court for rewriting the RICO statute in a manner that imposed endless procedural hurdles in the path of Irving Schwartz' constitutional right to be heard. Indeed, throughout this entire case

the District Court has far exceeded any accepted and usual course of judicial proceeding, without any restraints imposed by the Fourth Circuit. At this point, the exercise of this Court's power of supervision is needed.

6. The supposed settlement entered into by Petitioner cannot constitutionally be relied upon to uphold the forfeiture.

The settlement effected between Petitioner and the United States in February, 1984 cannot be relied upon to uphold the forfeiture, consistent with fundamental concepts of due process of law. To do so would be erroneous for two basic reasons.

First, the essential factual premise underlying the agreement reached between the United States and Petitioner was mistaken. Both parties assumed, incorrectly, that there had been a valid conviction of

defendant, Irvin Kovens, which had formed the legal predicate for the forfeiture imposed upon Petitioner. As eventually was revealed through the lengthy legal proceedings which led to the invalidation of the convictions of the Mandel defendants, including Kovens, the criminal prosecution was void ab initio. With the collapse of the basis for the convictions, everything which followed in the proceedings likewise became invalid. That necessarily included the forfeiture effectuated against Petitioner Schwartz, based upon the invidiously-applied nominee theory.

Second, and equally important, principles of contract law relied upon by the District Court and by the Fourth Circuit Court of Appeals to uphold the supposed settlement made by Petitioner have no proper application here. Petitioner had been placed in an extraordinarily disadvantaged

position vis a vis the United States by the time the settlement agreement was reached in February, 1984. He had been subjected to years of a tortuous process of appeals and related legal proceedings which were fundamentally defective in the constitutional sense. He confronted the insuparable hurdle of the criminal conviction of defendant Kovens, which could not be challenged or impeached by him. And he likewise faced the prospect of a further litigation of ill-defined content, called civil in nature, in which he would bear the burden of establishing his entitlement to property unjustly taken from him in the first instance and also overcoming the effect of a presumptively valid RICO forfeiture. To apply principles of contract law to sustain this farce of due process of law is itself a constitutional deprivation.

The correct legal analysis of this situation is one which recognizes Petitioner's right to the same protections as a criminal defendant in these proceedings. From that perspective, Schwartz' entitlement to return of the invalidly forfeited stock cannot be genuinely disputed.

CONCLUSION

For the foregoing reasons Petitioner, Irving Schwartz, submits that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Ransom J. Davis
H. Russell Smouse
Nancy S. Allen

APPENDIX

APPENDIX A

CONSTITUTION OF THE UNITED STATES (Amendment V)

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT
28 U.S.C. §1963 (1970 Version)

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United

States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of

all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(Added Pub.L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat.943).

RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT
28 U.S.C. §1963 (1984 Version)

§1963. Criminal penalties

(a) Whoever violates any provi sion of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law --

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any --

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled,

conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the Untied States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes --

(1) real property including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he

is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

[(d) Repealed. Pub.L. 98-473, Title II, § 2301(b), Oct. 12, 1983, 98 Stat. 2192]

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section --

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the

order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that --

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is

probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or

take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value

to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and

any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to --

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in

the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to --

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of

property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may -

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other

material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title

or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In

addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that --

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title or interest was vested in the petitioner rather than the defendant or was superior to any right, title or interest of the defendant at the

time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject

of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat.943, and amended Pub.L. 98-473, Title II, §§ 302, 2301(a)-(c), October 12, 1984, 98 Stat. 2040, 2192).

LEGISLATIVE HISTORY OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT
(1984 Version)
(Reprinted in 1984 U.S. Code Cong. & Ad. News 3388-3392)

18 U.S.C. 1963(g)

Subsection (g) concerns matters regarding the disposition of property. Following the seizure of the property, the Attorney General is authorized to direct its disposal by sale or other commercially feasible means, making due provision for the rights of any innocent persons. As in current law, this subsection provides that an interest that is not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant.

However, unlike current law, subsection (g) specifically prohibits reacquisition by the defendant of property he has forfeited.

Since, under current practice, third parties who assert an interest in property which is the subject of criminal forfeiture may not intervene in the criminal case - a principle set out in subsection (j) - subsection (g) authorizes the court to stay disposition of the property pending an appeal of the criminal case, if the third party demonstrates that the disposition of the property will result in irreparable injury, harm or loss to him.

Once the property has been disposed of, the proceeds are to be used to pay the expenses of the forfeiture and sale, including costs arising from the seizure,

maintenance, and custody of the property. The remaining amounts are to be deposited in the general fund of the Treasury.

18 U.S.C. 1963(h)

Subsection (h) of 18 U.S.C. 1963, as set forth in section 302 of the bill, describes several aspects of the authority of the Attorney General with respect to property that has been ordered forfeited. This authority is in essence carried forward from existing law, although in a more straightforward manner. Under 18 U.S.C. 1961, the Attorney General may designate other officials to exercise this authority or any other powers conferred upon him by the RICO statute. The authority described in subsection (h) includes (1) granting petitions for remission or mitigation of

forfeiture, restoring forfeited property to victims, and taking other actions to protect the rights of innocent persons; (2) compromising claims; (3) awarding compensation to persons providing information that led to a forfeiture; (4) directing the disposition, by the United States, of the property; and (5) taking measures to protect and maintain the property pending its disposition.

18 U.S.C. 1963(i)

In current 18 U.S.C. 1963(c), the procedures for disposition of the forfeited property, for consideration of petitions for remission and mitigation of forfeiture, and for other post-seizure matters are governed by the customs laws. In some respects,

however, these customs laws provisions have been found not adequate to address some of the particularly complex issues that arise in RICO forfeiture cases. Subsection (i) of 18 U.S.C. 1963, as amended by the bill, therefore provides for the development and promulgation of regulations to govern certain post-seizure matters. These regulations may be drafted to address some of the unique problems that arise in RICO forfeitures. Pending the promulgation of these regulations, the currently applicable provisions of the customs laws would remain in effect.

18 U.S.C. 1963(j)

Subsection (j) of the RICO forfeiture provisions, as amended by the bill, sets forth the recognized principle that third parties may not intervene in the criminal case. Moreover, once the indictment or information is filed, a third party is not to commence a civil suit against the United States; instead the third party should avail himself of the ancillary hearing procedure added by the Committee as a final section of the RICO amendments (18 U.S.C. 1963(m)).[1] This provision assures a more orderly disposition of both the criminal case and third party claims. Indeed, it is

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[1] This provision is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order, however.

anticipated that the new hearing procedure should provide for more expedited consideration of third party claims than would the filing of separate civil suits.

In S.829 as introduced, this provision of the bill required third parties to exhaust the administrative remedy of petitioning the Attorney General for remission or mitigation of forfeiture before seeking judicial resolution of their claims. In light of the Committee's addition of the new ancillary hearing procedure in section 1963(m), which is based on the recognition that third parties asserting legal claims inconsistent with the order of forfeiture are entitled to a judicial resolution of their claims, the language of subsection (j) was amended to reflect the purpose and scope of the new hearing procedure.

18 U.S.C. 1963(k)

This new subsection of 18 U.S.C. 1963 simply emphasizes the jurisdiction of the court to enter under these criminal forfeiture provisions, without regard to the location of the property. This principle is one of the distinctions between civil and criminal forfeitures because in civil forfeitures, the power of the court currently extends only to property within the district in which it is located.

18 U.S.C. 1963(l)

Subsection (l) to 18 U.S.C. 1963, as amended by the bill, authorizes the court to order the taking of depositions to facilitate the identification and location

of property that has been declared forfeited and the disposition of petitions for remission or mitigation of forfeiture. The taking of such depositions will provide for a more orderly and fair consideration of these matters and will permit the development of a more complete record.[2]

18 U.S.C. 1963(m)

This new subsection added to 18 U.S.C. 1963 was not included in S.829 as introduced. It provides for an ancillary hearing to be held after conviction of the defendant at which third parties asserting a

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[2] Although this provision does not specify the same authority to order depositions for the purposes of resolving matters raised in a hearing occurring under section 1963(m), discussed below, in such judicial hearings, this authority would be part of the inherent power of the court.

legal interest in property that has been ordered forfeited may obtain a judicial resolution of their claims.

Until recently, the Department of Justice had adhered to the position that all third parties, whether asserting a legal or equitable basis for relief from an order of criminal forfeiture, should, at least in the first instance, pursue the remedy of petitioning the Attorney general for remission or mitigation of forfeiture.[3] Traditionally, the Attorney General's decision with respect to such petitions, petitions which are most frequently filed as the result of civil forfeiture actions, has been viewed entirely as a matter of discretion and not subject to judicial

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[3] This practice was sanctioned in United States v. Mandel, 505 F. Supp. 189 (D. Md. 1981).

review. Since third parties with interests in criminally forfeitable property may not participate in the criminal trial, while all parties with an interest in civilly forfeitable property may participate in judicial forfeiture proceedings, strict application of the principle of discretionary, nonreviewable administrative decisions on third party claims in the criminal forfeiture context had been of concern to the Committee.

After introduction of S.829, the Department of Justice informed the Committee that their position with respect to third party claims in the criminal forfeiture context had changed. The Department's new position is that third parties who assert claims to criminally forfeited property which, in essence, are challenges to the

validity of the order of forfeiture are entitled to a judicial determination of their claims. Thus, it would be improper to require such parties to seek relief in the remission and mitigation process (as may have been implicit in the bill as introduced), since the granting of such petitions is solely a matter of executive discretion. However, the remission and mitigation process would remain the appropriate exclusive remedy for third parties who assert not a legal basis for relief, but rather mere equitable grounds.

Criminal forfeiture is an in personam proceeding. Thus, an order of forfeiture may reach only property of the defendant, save in those instances where a transfer to a third party is voidable. Thus, if a third party can demonstrate that his interest in

the forfeited property is exclusive of or superior to the interest of the defendant, the third party's claim renders that portion of the order of forfeiture reaching his interest invalid. The Committee strongly agrees with the Department of Justice that such third parties are entitled to judicial resolution of their claims.

There is, however, presently no statutory provision to specifically address procedures for the resolution of such claims in the criminal forfeiture context. The Department of Justice suggested, and the Committee agreed, that a procedure for expedited, judicial resolution of these claims be included in the criminal forfeiture provisions of the bill. The amendment adopted by the Committee adding a new subsection (m) to the RICO provisions

provides such procedures and was drafted with the assistance of the Department of Justice.[4]

Under the new ancillary hearing procedure, the government, following the entry of an order of forfeiture is to publish notice of the order of forfeiture and its intent to dispose of the property. Direct written notice to interested third parties may serve as a substitute for published notice. Within thirty days after publication of notice or the receipt of direct notice, any third party asserting a legal interest in the property ordered forfeited may petition the court (the court having heard the criminal case) for a hearing to adjudicate

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[4] The same provision has been added to the criminal forfeiture statute for all drug felonies set forth in section 303 of the bill.

the validity of his alleged interest. The hearing is to be held before the court alone.

If possible, the hearing is to be held within thirty days of the filing of the petition[5] and the court may hold a consolidated hearing to resolve all or several petitions arising out of a single case. At the hearing, both the petitioner and the United States may present evidence and witnesses, and cross-examine witnesses who appear. In addition to evidence and testimony presented at the hearing, the court may consider relevant portions of the record of the criminal case. This will allow the court to quickly dispense with claims that have already been considered at

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[5] The court may decline to grant a hearing, for example, if the petition fails to state any basis for relief described in this provision.

trial, as for example, where the jury has already determined that the third party held the property only as a nominee of the defendant or that a transfer to the third party was a sham transaction.

Paragraph (6) provides that a third party will prevail if his claim falls into one of two categories; first, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was

subject to forfeiture.[6] Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the hearing will be on the third party. However, the petitioner is held only to a preponderance of the evidence standard. Following the court's disposition of all third party petitions, or if no third party filed a petition within the time allowed, the United States would then have clear title to the property. This final provision attempts to address the problems increasingly encountered by the government in selling criminally forfeited property

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[6] The provision should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in 18 U.S.C. 1963(c), as amended by the bill.

because of concerns about the government's ability to convey clear title to such property in the absence of a judicial resolution of third party claims.

A third party who fails to obtain relief under the new ancillary hearing provision or who does not file a petition for a hearing may seek equitable relief from the Attorney General by filing a petition for remission or mitigation of forfeiture. The Attorney General's decision on such petition shall not be subject to judicial review, as is the case under current law.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 60(b)

RULE 60. Relief From Judgment or Order

* * *

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which

by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect

the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

A P P E N D I X B .

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IRVING T. SCHWARTZ *

V. *CIVIL NO. Y-81-350

UNITED STATES OF AMERICA *

* * * * * * * * * * * *

UNITED STATES OF AMERICA *

V. *CRIMINAL NO. Y-75-0822

MARVIN MANDEL, et al. *

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ORDER

In accordance with the attached Memorandum, it is this 25th day of January, 1990, by the United States District Court for the District of Maryland ORDERED:

1. That Plaintiff's Motion to Vacate Judgment and for Return of Forfeited Property pursuant to Rule 60(b) of the Federal Rules of Civil Procedure BE, and the same IS, hereby DENIED, and

2. That a copy of this Memorandum and Order be sent to all counsel.

JOSEPH YOUNG
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IRVING T. SCHWARTZ *

V. * CIVIL NO. Y-81-350

UNITED STATES OF AMERICA*

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UNITED STATES OF AMERICA *

V. * CRIMINAL NO. Y-75-0822

MARVIN MANDEL, et al. *

* * * * * * * * *

MEMORANDUM

Plaintiff, Irving T. Schwartz, pursuant to Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure, seeks to vacate the Order of Court dated March 26, 1984 and seeks return of property that has been forfeited to the United States of America pursuant to a final judgment in the criminal prosecution entitled United States v. Marvin

Mandel, Criminal No. Y-75-0822 (October 7, 1977) affirmed 591 F.2d 1347 (4th Cir.) cert. denied 455 U.S. 961 (1980).

At issue is plaintiff's claim to ownership of 240,765 shares of stock in the Southern Maryland Agricultural Association ("SMAA"). On August 23, 1977, a jury returned a verdict in United States v. Marvin Mandel, supra, convicting Irvin Kovens and five other defendants on charges of mail fraud, including violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq. The Plaintiff has requested oral argument; however, the issues have been fully briefed, and the Court has determined that oral argument is not necessary.

By special verdict, the jury determined, inter alia, that Irvin Kovens held a "RICO interest" in the particular shares of SMAA stock which are the subject of this controversy, and that the stock was therefore subject to forfeiture under RICO, 18 U.S.C. §1963(c).

Plaintiff Schwartz was not named in the Indictment and was not a defendant in the Mandel criminal proceeding. Accordingly, the relative interests in the SMAA shares, as between Plaintiff and Mr. Kovens, were not determined by the jury in that proceeding. Nor was Plaintiff afforded an opportunity to present testimony or other evidence at that trial in order to establish his claim to ownership of the stock.

On October 7, 1977, the Court entered an Order directing the criminal defendants to forfeit their full ownership interest in the SMAA to the United States. The Order allowed a period of twenty (20) days for all interested parties to show cause "why the forfeitures ordered herein shall not be finally effectuated." Plaintiff then filed his timely claim to ownership of the 240,765 shares.

In a subsequent Order, dated December 12, 1977, the Court directed that the stock be placed in escrow with the Clerk of the Court pending further order of the Court. Plaintiff's claim was deferred by a memorandum attached to the December 12 Order in which the Court stated that "the issue raised by petitioner Schwartz would be better handled by the Judge who is assigned

to deal with the forfeiture in a civil proceeding." Plaintiff's appeal of the December 12, 1977 Order was dismissed by the Fourth Circuit on March 10, 1978. The Mandel defendants also appealed the criminal convictions, and during the pendency of that appeal, all further proceedings regarding ownership of the SMAA stock were stayed.

On July 20, 1979, the Court of Appeals affirmed the convictions in United States v. Marvin Mandel, 591 F.2d 1347 (4th Cir.) cert. denied, 445 U.S. 961 (1980). On January 21, 1981, this Court ordered the SMAA stock forfeited but stayed the effect of the forfeiture to allow Plaintiff an opportunity to petition the Attorney General of the United States for remission or mitigation of the forfeiture pursuant to 18 U.S.C. §1963 and 28 C.F.R. §§9.1 - 9.7.

Plaintiff then filed a petition with the Attorney General[1], appealed the January 21, 1981 Order and filed this civil action seeking a declaratory judgment pursuant to 28 U.S.C. §§2201, 2202, 1346 and 1355. The Court of Appeals determined that Plaintiff, a non-party to the criminal action, was entitled to assert his claim to the forfeited property in a separate civil action. The matter was remanded and consolidated with Plaintiff's declaratory judgment action.

A trial scheduled for December 19, 1983, was postponed, and following settlement negotiations between Plaintiff the United States, the parties agreed to a compromise wherein 40% of the stock (96,306

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[1] The Attorney General denied Plaintiff's Petition for Remission or Mitigation of Forfeiture without a hearing on May 6, 1982.

shares) was allocated to the Plaintiff and the remaining 60% of the stock (144,459 shares) was to be retained as forfeited to the United States. This agreement was embodied in an Order of this Court dated March 26, 1984 and, the stock no longer available, Plaintiff was paid an amount based upon a stipulated value per share.

Plaintiff contends that his decision to compromise his claim to the stock was "predicated upon" the decisions of this Court reflected in its pre-trial Memorandum filed on March 20, 1984, in which certain preliminary issues relating to the conduct of the civil trial were resolved in the government's favor. Plaintiff's brief, at 2. In that Memorandum, the Court determined that: (1) the Plaintiff did not have a right to a jury trial on the issue of his

ownership of the stock; (2) the verdict in the Mandel case was admissible as evidence in the civil trial under Rule 803(22) of the Federal Rules of Civil Procedure; and (3) Plaintiff had the burden of proving that he, rather than Kovens, was the rightful owner of the SMAA stock. Order, Civil No. Y-81-350 (March 20, 1984). Plaintiff asserts that, "[g]iven these rulings by the Judge, the outcome of the civil trial was a foregone conclusion." Plaintiff's brief, at 11.

However, the government contends that Plaintiff's decision to settle could not have been "predicated upon" the March 20, 1984 Memorandum because, as indicated by the correspondence between the parties and the Court, Plaintiff had tentatively agreed to

the 60% - 40% division (subject only to resolution of a collateral tax issue) as early as September 9, 1983.

Subsequent to the March 26, 1984 Order, no further proceedings were held with regard to either the Mandel criminal case or Plaintiff's property claim until 1987. At that time, in response to the Supreme Court's narrowed interpretation of the mail fraud provisions of 18 U.S.C. §1341 in the case of McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the six Mandel defendants petitioned the Court for writ of error coram nobis to vacate the prior judgment of conviction.[2]

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[2] Although each of the defendants had already served his respective term of imprisonment under the 1977 convictions, the coram nobis writ was sought to obtain restitution for fines already paid, including the forfeitures under the RICO convictions, and as a remedy for any other

(footnote continued)

On November 12, 1987, the writ was granted and the convictions of the Mandel defendants were set aside. Following the reasoning of the Southern District of New York in Ingber v. Enzor, 664 F. Supp. 814, 823 (S.D.N.Y. 1987), the trial judge concluded that retroactive application of McNally was required. Mandel, 672 F. Supp., at 875, n.7. Accordingly, the 1977 convictions and adjudications of guilt of all six defendants were set aside as being void ab initio. Id. at 879.

Consequently, the RICO forfeitures were also declared void and the United States was ordered to grant restitution for any fines

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(footnote continued from previous page) "results of the convictions [that] may persist." United States v. Mandel, 672 F. Supp. 864, 867 (D.Md.) affirmed 862 F.2d 1067 (4th Cir. 1988) (quoting United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed.2d 248 (1954)).

paid under the earlier convictions. Id. at 876, n.2.[3] The Fourth Circuit Court of Appeals affirmed the issuance of the writ. United States v. Mandel, 862 F.2d 1067 (4th Cir. (Widener, J.) cert. denied 455 U.S. 961 (1989).

Plaintiff now seeks to have the settlement and final disposition of his civil property claim vacated pursuant to Rule 60(b). Sections (5) and (6) of that Rule provide as follows:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ...(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective

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[3] As of this date, neither Kovens, nor his estate, has asserted a claim to the 240,765 shares forfeited pursuant to his "RICO interest" found by the jury.

> application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(5) and (6). The "any other reason" language contained in Rule 60(b)(6) has been generally interpreted to indicate an intent by the drafters to make clause (6) and the first five clauses mutually exclusive. Thus, relief is not available under clause (6) if it would have been available under the earlier clauses. 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil, §2864 (1973). Plaintiff's reference to both clauses (5) and (6) of the Rule must, therefore, be treated as asserting alternative grounds for relief.

Rule 60(b) further provides that "[t]he motion shall be made within a reasonable time."[4] In determining whether the motion has been brought within a reasonable time the Court must inquire into the effect, if any, of the delay on the party opposing the motion. See e.g., Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983); see also Annotation, 15 ALR Fed. 193, 203. Thus, when the delay causes prejudice to the opposing party's ability to gather and present his evidence and witnesses after reliance on what it had thought was a final judgment or order, the reasonable time

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[4] In addition to being governed by the reasonable time limitation, motions to vacate based upon the reasons contained in clauses (1), (2), and (3) shall be made "not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b).

limitation has been exceeded. Mach v. Pennsylvania R. Co., 198 F. Supp. 473 (D.C. Pa. 1961).

Although approximately six (6) years have passed since this Court approved the stipulation of settlement between Plaintiff and the government, there is little or no prejudice to the government as a result of the delay. The shares of stock were sold under the terms of the 1984 settlement. The government has not contended that there is any difficulty in measuring the value of any award of restitution, resulting from the passage of time, and there is no indication that the government has been prejudiced in its ability to present evidence in opposition to the motion.

Finally, the "changed circumstances" upon which Plaintiff relies result from the 1987 Order to vacate in the Mandel case and the 1988 affirmance by the Court of Appeals. The Supreme Court denied certiorari in June 1989, and the plaintiff filed this motion on October 10, 1989. The Court finds that this motion was filed within the "reasonable time" limitation under the circumstances of this case.

Although timely filed, the government asserts that analysis under Rule 60(b) is inappropriate because the March 26, 1984 Order from which relief is sought, is not a final judgment on the merits of the action. Rather, the Order merely adopted and gave legal effect to the terms of settlement agreed to by the parties. The government thus contends that Rule 60(b) does not

provide grounds for relief under the circumstances of this case. United States of America brief in Opposition, at 16.

Rule 60(b) provides for relief from "a final judgment, order, or proceeding". This language has been liberally construed to afford post-judgment relief with regard to default judgments, see e.g. Stancil v. United States, 200 F. Supp. 36 (D.C. Va. 1961) and interlocutory judgments. See e.g. Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970).

In addition, the Fourth Circuit has held that a consent decree, intended as a final disposition of a cause of action, is entitled to the same res judicata effect as a final judgment on the merits. Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981). Indeed, the "equitable"

provisions of clauses (5) and (6) of the Rule have frequently been held to afford relief from the prospective application of equitable consent decrees based upon stipulation of the parties. See generally C. Wright & A. Miller, Federal Practice and Procedure: Civil §§ 2863 and 2864. Similarly, this Court finds that, although not based upon a full litigation of the merits, the March 26, 1984 Order constitutes a "final" disposition of the case for purposes of application of Rule 60(b).

Plaintiff does not specify which of the particular grounds under Rule 60(b)(5) should apply to this case. However, as the government correctly observes, the first of these grounds, i.e., that "the judgment has been satisfied, released or discharged," clearly does not apply.

The second phrase under clause (5) provides for relief from a final order when "a prior judgment upon which it is based has been reversed or otherwise vacated." Appellate Courts have adopted a narrow construction of this provision limiting its application to cases in which the present judgment is "based on" the prior judgment in the sense of res judicata or collateral estoppel. Berryhill v. United States, 199 F.2d 217, 219 (6th Cir. 1952)[.] It is thus the settled rule that "a change in the judicial view of the applicable law, after a final judgment, is not a basis for vacating a judgment entered before announcement of the change." Berryhill supra; Brown v. Clark Equipment Co., 96 F.R.D. 166, 173 (1st Cir. 1982); DeFilippis v. United States, 567

F.2d 341, 343 (7th Cir. 1977); see generally, Wright & Miller, supra §2863, at 204; 124 U.Pa.L.Rev. 843, 850.

This Court has already determined that the forfeiture pursuant to the 1977 Mandel convictions cannot have a collateral estoppel or res judicata effect as to future claimants who were not parties to the original action. Memorandum and Order, Civil No. Y-81-350 (January 21, 1981), at 5. The only effect that the Mandel decision had upon the settlement and the March 26, 1984 Order is in the parties' assessment of the risks involved in carrying the matter to a full trial on the merits. Therefore, the Order could not have been "based on" the prior judgment for purposes of Rule 60(b)(5).

The third phrase under clause (5) provides relief when "it is no longer equitable that the judgment should have prospective application." In considering the question of when, for purposes of Rule 60(b)(5), a judgment can be said to have "prospective application," it was held that:

> Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect; even a money judgment has continuing consequences, most obviously until it is satisfied, and thereafter as well inasmuch as everyone is constrained by his or her net worth. That a court's action has continuing consequences, however, does not necessarily mean that it has "prospective application" for purposes of Rule 60(b)(5).

Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138 (D.C. Cir. 1988). Adopting the analysis continued in two early

Supreme Court decisions[5], Does concluded that "the standard to be applied in determining whether an order or judgment has prospective application within the meaning of Rule 60(b)(5) is whether it is 'executory' or involves 'the supervision of changing conduct or conditions,'...." Twelve John Does, 841 F.2d, at 1139.

It is clear that the March 26, 1984 Order of this Court, adopting the terms of settlement stipulated between the parties, was intended to constitute a final disposition of the Plaintiff's property claim. The terms of that Order were not "executory" or involving a continuing supervision of changing conditions. The

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5 United States v. Swift & Co., 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932), and State of Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1856).

Court therefore concludes that none of the grounds for relief provided for under clause (5) of Rule 60(b) are applicable to the circumstances of this case.

Plaintiff contends, in the alternative, that he is entitled to post-judgment relief as a matter of equity under clause (6) of the Rule. As stated supra, clause (6) permits the Court to vacate a final order for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). The 1948 amendments added caluse (6) to give courts the power to vacate judgments whenever appropriate to accomodate justice. Klapprot v. United States, 335 U.S. 601, 614-615, 69 S.Ct. 384, 93 L.Ed. 266 (1949). Motions under Rule 60(b)(6) are addressed to the discretion of the District Court and should be granted in

cases of "extreme hardship" where relief would not be available under any of the other provisions. Bell Tel. Laboratories, Inc. v. Hughes Aircraft Co., 73 F.R.D. 16, 21 (D.C.Del. 1976).

In Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950) the Supreme Court held that if a party makes a free and conscious choice regarding the conduct of the litigation, he cannot be granted relief under Rule 60(b)(6) from the consequences of that decision. Id. at 211. The petitioner in Ackermann was a native of Germany who had been naturalized in the United States. Complaints had been filed against Ackermann and his business partner to cancel their naturalization on grounds of fraud. After a consolidated proceeding in which both individuals were represented by

counsel, the District Court vacated the orders admitting both individuals to citizenship. One petitioner, Keilbar, appealed that order and the Court of Appeals reversed. However, Ackermann did not appeal, but later filed a motion in the District Court to vacate under Rule 60(b).

On appeal, the Supreme Court held:

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case.

340 U.S., at 198, 71 S.Ct., at 211.

The rule stated in Ackermann has almost uniformly been followed. See e.g. United States v. O'Neil, 709 F.2d 361, 373 (5th Cir. 1983); Marshall v. Board of Ed., Bergenfield, N.J., 575 F.2d 417, 424 (3d Cir. 1978); Bell Tel. Laboratories, Inc. v. Hughes Aircraft Co., supra, at 21; Lubben v. Selective Service System Local Bd. No. 2, 453 F.2d 645, 651 (1st Cir. 1972); Berryhill v. United States, supra, at 219.

In DeLong's, Inc. v. Stupp Bros. Bridge & Iron Co., 40 F.R.D. 127 (E.D.Mo. 1965), the plaintiff chose to dismiss two defendants from his action in order to gain an earlier trial date. After an adverse judgment, he moved to vacate the earlier dismissals under Rule 60(b)(6). The Court denied the motion reasoning that the

plaintiff had made a calculated choice and it was through such choice that he put himself in the position from which he sought relief. Id. at 130.

Plaintiff, here, made a conscious choice to forego the risk of litigation and to settle for the certainty of receiving 40% of his original claim. Such an exercise of free will is clearly the type presented in the Ackermann line of cases, and it is thus distinguishable from those situations involving "extreme hardship" contemplated by the drafters of the Rule.

Plaintiff's subjective view that an adverse decision on his claim was a "foregone conclusion" does not change the fact of a bargain between two parties, represented by counsel, involving a free decision based upon calculated risks. As

the correspondence amply indicates, Plaintiff had tentatively agreed to the terms of settlement approximately five (5) months before this Court's ruling on the admissibility of the Mandel verdict. Accordingly, no extreme hardship has been visited upon the Plaintiff and the motion under Rule 60(b)(6) must be denied.[6]

JOSEPH YOUNG
Senior United States District Judge

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[6] In his Reply Brief, Plaintiff, for the first time, raises further grounds for relief under Rule 60(b)(4). Such additional grounds are beyond the scope of the Motion and, the government having no opportunity to respond, such additional grounds will not be considered by this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IRVING T. SCHWARTZ	*	
v.	*	CIVIL NO. Y-81-350
UNITED STATES OF AMERICA	*	

* * * * * * * * * * * * * * *

UNITED STATES OF AMERICA	*	
v.	*	CRIMINAL NO. Y-75-0822
MARVIN MANDEL, et al.	*	

* * * * * * * * * * * * * * *

ORDER

In accordance with the attached Memorandum, it is this 27th day of March, 1990, by the United States District Court of the District of Maryland ORDERED:

1. That Plaintiff's Amended Motion to Vacate Judgment, considered as a Motion to Alter or Amend Judgment, BE and the same is hereby DENIED; and

2. That a copy of this Memorandum and Order be mailed to counsel.

JOSEPH YOUNG
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IRVING T. SCHWARTZ	*	
v.	*	CIVIL NO. Y-81-350
UNITED STATES OF AMERICA	*	
* * * * * * * * * * * * * * * *		
UNITED STATES OF AMERICA	*	
v.	*	CRIMINAL NO.Y-75-0822
MARVIN MANDEL, et al.	*	
* * * * * * * * * * * * * * * *		

MEMORANDUM

Plaintiff, Irving T. Schwartz, has filed an Amended Motion to Vacate Judgment and for Return of Forfeited Property. By order dated January 25, 1990 the Court denied Plaintiff's original motion for post-judgment relief under Rule 60(b) of the Federal Rules of Civil Procedure.

Although captioned as an "Amended Motion", Plaintiff's motion is properly considered as a "Motion to Alter or Amend a Judgment" pursuant to Fed. R. Civ. P. 59(e).[1]

Thus construed, the motion is subject to the Rule's ten (10) day limitations period. Counting from the date following the January 25, 1990 Memorandum and Order, as prescribed by the computation of time provision of Rule 6(a), the period for timely service expired on or about February 8, 1990. Plaintiff

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[1] The government correctly asserts that Rule 15(a) is inapplicable in that the original Motion to Vacate does not fall within the Rule 7(a) definition of "pleadings" subject to the Rule 15 liberal amendment provisions. Furthermore, because Plaintiff contends that the Court committed error of law in its January 25, 1990 decision, rather than asserting excusable neglect of counsel or other extrinsic grounds for post-judgment relief, the Court concludes that Rule 60(b) is inapplicable to the "amended" motion.

first requested reconsideration in a letter dated February 27, 1990, and this motion was served on or about February 20, 1990.

The Court finds that Plaintiff's motion is untimely and concludes that the motion may be denied on that basis alone. However, in the interest of finality and avoidance of unnecessary relitigation of issues previously raised, albeit improperly, the Court will discuss its reasons why, even upon reconsideration, Plaintiff's motion must be denied.

The relevant facts are fully set forth in the Memorandum attached to the January 25, 1990 Order. Essentially, Plaintiff seeks relief from the March 24, 1984 Order of the Court adopting and giving effect to the agreement reached between Plaintiff and the government to settle Plaintiff's claim

to a property interest in 240,765 shares of stock in the Southern Maryland Agricultural Association ("SMAA"). The stock was forfeited to the government pursuant to the RICO conviction of a third party, Irvin Kovens, in the case of United States v. Mandel, Criminal No. Y-75-0822. As a result of a change in the Supreme Court's interpretation of the RICO statute, 18 U.S.C. § 1961 et seq., the convictions and forfeitures of each of the Mandel defendants were subsequently held void ab initio. United States v. Mandel, 672 F. Supp. 864, affirmed 862 F.2d 1067 (4th Cir. 1988).

Although not a party to the Mandel criminal case, Plaintiff claims that the March 24, 1984 Stipulation and Order was "based on" the voided judgment of conviction and forfeiture in United States v. Mandel,

supra, since voided, and that the agreement of the parties should similarly be declared void. As discussed in the January 25, 1990 Memorandum, the Court disagrees with Plaintiff's position that the agreement to settle for 40% of the claimed interest in the stock, rather than to seek mitigation of the presumed forfeiture at trial, was other than a decision to compromise based upon Plaintiff's assessment of the risks of litigation. The government's corresponding agreement to relinquish 40% of the property, despite the presumption of forfeiture similarly reflects its assessment of the risk that Plaintiff might prevail at trial or upon appeal.

Even if the forfeiture was determined valid (i.e. if Plaintiff failed to rebut the presumption of its validity), Plaintiff

would have retained the rights of an innocent third party to demonstrate that his interest in the forfeited property is exclusive of, or superior to, the interest of the defendant. United States v. Rogers, 602 F. Supp. 1332, 1347 (D. Colo. 1985); see United States v. Truglio, 660 F. Supp. 103 (N.D. W.Va. 1987); see also Senate Report No. 98-225, P.L. 98-473 reprinted in 1984 U.S. Code Cong. & Admin. News, 3182, 3391 (the right to a judicial determination of third party claims to forfeited property existed even prior to the 1984 amendments to 18 U.S.C. § 1963). Such a showing would not have been precluded by any finding as to the validity of criminal forfeiture and would have been in addition to the right to

petition the Attorney General for rescission and mitigation of the forfeiture. 28 C.F.R. §§ 9.1 - 9.7.

Even if not "based upon" the voided convictions, Plaintiff argues that the settlement decree should be considered void for purposes of Rule 60(b)(4) on grounds that the government's sixty percent interest in the stock, agreed to pursuant to the terms of the settlement, is rendered void by the invalidity of the RICO forfeitures.

It is settled law that a consent judgment is no more than a judicially approved contract and should be treated as such. United States v. I.T.T. Continental Baking Co., 95 S.Ct. 926, 420 U.S. 223, 43 L.Ed.2d 148 (1975); United States v. Northern Colorado Water Conservancy District, 608 F.2d 422 (10th Cir. 1979);

Crowe v. Cherokee Wonderland, Inc., 379 F.2d 51 (4th Cir. 1967). Under this analysis, Plaintiff's assertions regarding the voidness of the claims underlying the bargain constitutes an argument for restitution based on the mutual mistake of the bargaining parties. However, the mistake, if it is a mistake, pertains to a matter of law, i.e., the legality of the underlying RICO forfeiture.

"One who pays money under a mistake of law has no right to restitution thereof, even though it was not legally due, if the payee claimed it as of right honestly and in good faith." Corbin, Contracts, One Volume Ed., § 617, at 573; see Sentry Indem. Co. v. People, 800 F.2d 1547 (11th Cir. 1986) (money paid in reliance on existing judicial

decisions is not subject to return on a restitution theory when those decisions are later disapproved).

Plaintiff does not allege, and the evidence to date has not shown, any indication of a lack of good faith by the government in the bargaining and settlement of the Plaintiff's property claims. Under the applicable law, the Court concludes that Plaintiff is not entitled to restitution of the 60 percent of the stock conceded to the government, on grounds of what, in retrospect, turned out to be a mistaken assessment of the law relating to RICO forfeitures.

Upon again reviewing the relevant documents and the applicable law, the Court concludes that the relief sought by Plaintiff is not warranted by law or by

fact. Accordingly, the Court finds no basis to alter or amend its determination that the March 24, 1984 Order was not "based upon" a void judgment for purposes of relief under Rule 60(b).

JOSEPH YOUNG
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IRVING T. SCHWARTZ	*	
V.	*	CIVIL NO. Y-90-602
UNITED STATES OF AMERICA	*	

* * * * * * * *

ORDER

In accordance with the attached Memorandum, it is this 30th day of August, 1990, by the United States District Court for the District of Maryland ORDERED:

1. That Plaintiff's Complaint for Declaratory Judgment BE, and the same IS, hereby DENIED, and

2. That a copy of this Memorandum and Order be sent to all counsel.

JOSEPH YOUNG
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IRVING T. SCHWARTZ	*	
V.	*	CIVIL NO. Y-90-602
UNITED STATES OF AMERICA	*	

* * * * * * * *

Date: August 30, 1990

Ransom J. Davis, Esquire, Baltimore, Maryland, counsel for the plaintiff.

Breckinridge L. Willcox, Esquire, United States Attorney for the State of Maryland, Baltimore, Maryland, and Jefferson M. Gray, Esquire, Assistant United States Attorney, Baltimore, Maryland, for the defendant.

YOUNG, Senior United States District Judge

MEMORANDUM

On February 23, 1990, Plaintiff, Irving T. Schwartz, filed a Complaint for Declaratory Judgment. Plaintiff seeks a declaration that the Order of Forfeiture entered pursuant to a final judgment in the criminal prosecution United States v.

Mandel, et al., was void ab initio, and, on the basis of the determination and again in reference to the criminal case, Plaintiff seeks a declaration that the United States lacks the statutory authority to retain a void RICO forfeiture but instead holds the stock in trust for the rightful owner, Irvin Schwartz. Defendant has filed a Motion to Dismiss Plaintiff's Complaint, Or In The Alternative, Motion for Summary Judgment on the ground that Plaintiff's complaint is barred by the doctrine of res judicata.

Although filed as a complaint, Plaintiff's Complaint For Declaratory Judgment is another creative attempt to influence this Court to vacate the Order of Forfeiture, March 24, 1984. The Court finds that Plaintiff's complaint is barred by res judicata and is, therefore, dismissed.

The pertinent facts are fully detailed in the Memoranda attached to the January 25, 1990 and March 27, 1990 Orders. Briefly, Plaintiff and Defendant entered into a settlement agreement whereby Plaintiff forfeited his claim to a property interest in 240,765 shares of stock. The parties entered into this settlement subsequent to the RICO convictions of a third party, Irvin Kovens, and other defendants in the case, United States v. Mandel, Criminal No. Y-75-0822. As a result of the Supreme Court's interpretation of the RICO statute, 18 U.S.C. 1961 et seq., however, the convictions and forfeitures of each of the Mandel defendants became void ab initio. United States v. Mandel, 672 F. Supp. 864, aff'd. 862 F.2d 1067 (4th Cir. 1988).

In his prior two motions, Plaintiff sought to vacate the Order of March 26, 1984, which gave effect to the agreement between the two parties. This Court denied both motions in Orders issued on January 25, 1990 and March 27, 1990, finding that Plaintiff did not base his decision to enter into the settlement upon the judgment of conviction and forfeiture in United States v. Mandel, supra, since voided. On April 16, 1990, Plaintiff noted an appeal.

"Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). See 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice 0.405[1]

(1988)("... in respect to the effect of a valid, final judgment [,] that such a judgment, when rendered on the merits, is no absolute bar to a subsequent action between the same parties or those in privity with them, upon the same claim or demand ..."). "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." Comm'r v. Sunnen, 333 U.S. 591, 597, 60 S.Ct. 715, 92 L.Ed. 898 (1948) (emphasis supplied). Therefore, dismissal of a complaint, on res judicata grounds, requires: 1) that a court of competent jurisdiction entered a valid final judgment on the merits in the earlier suit; 2) that the later suit alleges the same cause of action as the earlier suit;

and, 3) that the parties to the later suit are the same as or in privity with those in the earlier suit.[1] See Federated Dep't Stores v. Moitie, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981). Because Plaintiff misconstrues the doctrine of res judicata, this Court will clarify the elements and how they bear on Plaintiff's present Complaint for Declaratory Judgment.

"A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed. 2d 308 (1980); Cromwell v. County of Sac, 94 U.S. 351, 352, 24 L.Ed. 195 (1877). "A 'judgment on the merits', as

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[1] This element is not in controversy. The parties to this action are the same as the prior two actions.

that phrase is used in conventional statement of the res judicata doctrine, is not necessarily a judgment based upon a trial of contested facts." 1B Moore's, supra, 0.409[1.-2]. Defendant maintains, and this Court agrees, that Plaintiff's Declaratory action seeks the same relief sought in Plaintiff's Motion To Vacate Judgment and For Return of Forfeited Property filed October 10, 1989 in Irving T. Schwartz v. United States of America, Civil Action No. Y-81-350 and in Plaintiff's Amended Motion To Vacate Judgment and For Return of Forfeited Property filed by Plaintiff in the same action on February 21, 1990. This Court denied relief in Orders

issued on January 25, 1990 and March 27, 1990. It is to these Orders that res judicata extends.[2]

Plaintiff argues that res judicata does not attach to these Orders since such Orders[3] are not "judgments", nor are the

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[2] There appears to be some confusion as to which Orders res judicata applies. Plaintiff attempted to show that the Order of March 26, 1984, approving the agreement between the parties pertaining to the division of stock in Southern Maryland Agriculture Association, was the Order to which res judicates applied, if it applied at all. See Plaintiff's Supplemental Brief at 5 (Plaintiff argues that there has been a change of circumstances between March 26, 1984 and the present Complaint resulting from the 1987 Order to Vacate in the Mandel case and the 1988 affirmance by the Court of Appeals). Plaintiff's next attempt to refute Defendant's opposition to this complaint is to twist Defendant's res judicata reasoning into its intent to argue collateral estoppel. This Court recognized Defendant's Motion to Dismiss on res judicata grounds, not on collateral estoppel ground.

[3] Plaintiff confuses the finality of "filing a motion" and "an order denying a

(footnote continued)

judgment[s] on the merits. Plaintiff's Supplemental Brief (Pl. Supp. Br. at 2-3).

Plaintiff contends that a "decision" and a "judgment" are two separate entities under the doctrine of res judicata. Pl.

(footnote continued from previous page) motion". Defendant correctly instructs the Plaintiff as to the differences. As Defendant notes, filing a Rule 60(b) motion "does not affect the finality of a judgment or suspend its operation." Fed. R. Civ. P. 60(b). "Once the Court renders its decision on the motion to vacate, however, a different situation exists. If the court grants the Rule 60(b) motion, the judgment is set aside. If, as in this case, the motion is denied, the original judgment stands." Defendant's Reply to Plaintiff's Supplemental Brief at 6-7. This order is final and appealable. Id. See Ford Motor Co. v. Busam Motor Sales, 185 F.2d 531 (6th Cir. 1950) ("[a]n appeal is properly taken from the judgment previously entered rather than from the order which refused to set it aside"). See Plotkin v. Pacific Telephone & Telegraph Co., 688 F.2d 1291, 1292 (9th Cir. 1982) (order denying motion to vacate judgment is appealable as a final judgment); St. Luke's Hospital v. Melin, 172 F.2d 532, 533 (8th Cir. 1949) (judgment of district court became final when district court denied motion to vacate): Zadig v. Aenta

(footnote continued)

Supp. Br. at 2. Apparently, Plaintiff is of the belief that the orders issued denying Schwartz relief are "decisions" not "judgments" and accordingly, cannot be given res judicata effect. These two terms are commonly used interchangeably. Black's Law Dictionary 755 (5th ed. 1979). As Defendant notes, Fed. R. Civ. P. 54(a) defines "judgment" as it is used in "these rules, to include a decree and any order from which an appeal lies." Compare Dilly v. S. S. Kresge, 606 F.2d 62, 63 (4th Cir. 1979)("a final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment") with U.S. v. McWhirter, ____ F.2d

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(footnote continued from previous page)
Ins. Co., 42 F.2d 142, 144 (2nd Cir. 1930) (order denying motion to vacate order dismissing complaint was "final" appealable decision).

102, 104 (5th Cir. 1967)("'final judgment' is defined as one which terminates the action and leaves nothing to be done but the ministerial functions necessary to execute the judgment").

Plaintiff's argument that these Orders are not "judgment[s] on the merits" is equally without merit. For the purpose of res judicata, a decision is "on the merits" if it is based "on the legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form." Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622, 625 (4th Cir.), cert. denied, 350 U.S. 838, 76 S.Ct. 76, 100 L.Ed.2d 748 (1955); See also Clegg v. U.S., 112 F.2d 886, 887 (10th Cir. 1940) (" 'Merits' has been defined as 'the real or substantial grounds of action or defense as distinguished from matters of

practice, procedure, jurisdiction, or form.'"); See also Harper Plastics, Inc. v. Amoco Chemicals Corp., 657 F.2d 939, 943 (7th Cir. 1981). As Defendant accurately states, this Court's denial of Plaintiff's motions to vacate, were on substantive, rather than technical or procedural grounds. Therefore, these Orders were "on the merits" satisfying the first element of res judicata.

Dismissing the complaint, under the res judicata doctrine, requires the claims to be identical. Parklane, supra. If "a single core of operative facts" forms the basis of both suits, then the present complaint must be dismissed. See Smith v. City of Chicago, 820 F.2d 916, 918 (7th Cir. 1987). The settlement between the parties embodied in the Order of this Court dated March 26, 1984

and the subsequent granting of the writ of error coram nobis setting aside the convictions of the Mandel defendants as being void ab initio is the factual basis for both the motions to vacate and the present Complaint for Declaratory Judgment. Although Plaintiff continues to seek victory by changing the caption of each of his actions, "a mere change in legal theory does not create a new cause of action". 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, 4407 at 63 (1981). See Smith, supra at 918; Cannon v. Loyola Univ., 784 F.2d 777, 780 (9th Cir.), cert. denied 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987).

In Plaintiff's Motion to Vacate Judgment and For Return of Forfeited Property at 14-15, Irving T. Schwartz v.

U.S. (No. Y-81-350), Plaintiff sought, inter alia, 1) to have the Court declare the agreement entered into on February 2, 1984 null and void, Plaintiff's Motion at 14, and 2) a court order awarding the full amount of the SMAA stock, previously declared forfeited to the United States, restored to Plaintiff as rightful owner or, alternatively, to award Plaintiff the full monetary value of the stock. Plaintiff's Motion at 15. In his Amended Motion to Vacate Judgment and Motion for Reconsideration in the same action, Plaintiff sought to have the Order of March 26, 1984 declared void under Rule 60(b)(4), arguing that the RICO forfeiture based upon a void conviction is void. Id. at 12-14.

By his present Complaint for Declaratory Judgment, it is obvious that Plaintiff is determined to be victor without considering judicial procedure. Here, Plaintiff seeks the same resolution, that the order of Forfeiture in United States v. Mandel, et al. was void ab initio, and, on the basis of that determination and again in reference to the criminal case, Plaintiff seeks a declaration that the United States lacks the statutory authority to retain a void RICO forfeiture but instead holds the stock in trust for the rightful owner, Irving Schwartz. The common cause of action between the prior two motions and this suit is clear, the desire to seek relief from the March 24, 1984 Order.

Although Plaintiff readily admits that "the underlying subject of both motions and the Complaint for Declaratory Judgment are essentially the same", Plaintiff argues that this Court failed to address these issues in either of the two Orders.

In fact in both Orders, this Court spoke directly to the first issue, declaring the Order of Forfeiture void. The Court determined that the March 24, 1984 Stipulation and Order was not "based on" the Mandel convictions[4] for the purposes of Rule 60(b)(5) but that other factors were considered in Plaintiff's decision to enter into settlement. The Memorandum states "[t]he only effect that the Mandel decision had upon the settlement and the March 26, 1984 Order is in the parties' assessment of the risks involved in carrying the matter to

a full trial on the merits." Memorandum and Order, Civil No. Y-81-350 (January 25, 1990), at 13. In the Memorandum and Order in the same action (March 27, 1990), the Court denied the Rule 60(b)(4) motion, stating that the Order of Forfeiture was not "based on" the voided convictions nor that the claims underlying the bargain constitutes an argument for restitution based on mutual mistake of the parties. Id. at 3-4. Because the Court determined that the Order of Forfeiture is to remain in force, the Court need not address the second issue, whether the United States lacks statutory authority to retain a void forfeiture. In fact, due to the reasoning of this Court, it is unable to address the second issue since it would require a declaration of law which cannot affect the

rights of the litigants before it. North Carolina v. Brice, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); See Oil Workers Unions v. Missouri, 361 U.S. 363, 367, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960) ("the duty of this Court is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it"). The elements constituting res judicata are satisfied.

However, Plaintiff further asserts, incorrectly, that res judicata does not apply to declaratory judgments. Plaintiff's Response to Defendant's Opposition at 3. Defendant clarifies this point:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that have been invaded; regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Restatement (Second) of Judgments, 24 comment a (emphasis supplied). Additionally, "[s]o long as the request for declaratory relief is combined or followed with coercive relief, the claim preclusion rules that apply to coercive relief apply with full force." 18 Wright, Miller & Cooper, supra, 4440 at 401. See Jackson v.

Hayakawa, 605 F.2d 1121, 1125 (9th Cir. 1979), cert. denied, 445 U.S. 952 (1980) ("[a]lthough damages are sought here, whereas declaratory relief was sought in [prior case], the issues are identical); Neale v. Goldberg, 525 F.2d 332, 332 (9th Cir. 1975) (where judgment in state court for relief in addition to simple declaration of rights of parties, the judgment was res judicata as of same issues subsequently presented by complaint in district court). Here, Plaintiff is seeking more than a declaration of rights. He is seeking to have the Order of Forfeiture voided, ab initio. This Court has previously determined that the Order of Forfeiture will stand. Since the request for declaratory

relief is combined with a request for coercive relief, the claim preclusion rules apply.

It is clear that Plaintiff misinterprets the law of declaratory judgments, since this Complaint for Declaratory Judgment should never have been filed. Declaratory judgments require the existence of an actual controversy. To entertain a declaratory judgment action, the controversy "must exist [] at the time the action is for disposition and exist at the time it was initiated." Golden v. Zwicker, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 13 (1969). "An action for declaration may not be employed to relitigate a claim already adjudicated..." Restatement (Second) of Judgments 33 comment a (1982). "So also an action to adjudicate interests in

property ... may be cast in declaratory form. This should not alter the res judicata effects of the judgments." Id. comment d.

The substance of the claims sought by Plaintiff were addressed, disposing of any controversy, as of the Order dated January 25, 1990. The Order dated March 27, 1990, further emphasized this Court's decision denying Plaintiff's demand to void the Order of Forfeiture. Unquestionably, no controversy existed subsequent to March 27th, and no actual controversy exists at this time, the date of disposition. Since the cause of action here was addressed in substance in the prior two Orders, res judicata applies. Plaintiff has taken the appropriate steps by noting an appeal of the January and March Orders.

Accordingly, the Complaint for Declaratory Judgment is hereby dismissed.

JOSEPH YOUNG
Senior United States District Judge

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IRVING T. SCHWARTZ, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee, and	No. 90-6043
UNITED STATES OF AMERICA, Plaintiff, v. MARVIN MANDEL, et al., Defendant.	
IRVING T. SCHWARTZ, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee, and	No.

UNITED STATES OF AMERICA, Plaintiff, v. MARVIN MANDEL, et al., Defendant.	90-6061

IRVING T. SCHWARTZ,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 90-6162

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Joseph H. Young, Senior District Judge.
(CA-81-350-Y, CR-75-822, CA-90-602-Y)

Argued: July 30, 1991

Decided: September 28, 1992

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Russell and Judge Hall concurred.

COUNSEL

ARGUED: Ransom J. Davis, WHITEFORD, TAYLOR & PRESTON, Baltimore, Maryland, for Appellant. Jefferson McClure Gray, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

ON BRIEF: H. Russell Smouse, Nancy S. Allen, WHITEFORD, TAYLOR & PRESTON, Baltimore, Maryland, for Appellant. Richard D. Bennett, United States Attorney, Baltimore, Maryland, for Appellee.

OPINION

WIDENER, Circuit Judge:

I

These three consolidated appeals are the latest chapter in fifteen years of litigation spawned by the indictment and conviction of Marvin Mandel and his co-defendants (the Mandel defendants) under the federal mail fraud statute and the Racketeer Influenced and Corrupt Organizations Act

(RICO). At the time of the convictions, the United States asserted a RICO forfeiture claim to a block of stock in the Southern Maryland Agricultural Association (SMAA), contending that Irvin Kovens, one of the Mandel defendants, was the true owner. Appellant, Irving Schwartz, who was not indicted in the Mandel case, argued then and argues now, the he, not Kovens, owned the stock. Schwartz and the United States settled their dispute over the stock, and on March 26, 1984 the district court entered a judgment giving effect to the terms of the settlement.

In 1988 this court affirmed the grant of a writ of error coram nobis in favor of all Mandel defendants vacating their convictions. Schwartz now seeks to reassert

his claim to the stock.* In this appeal, Schwartz seeks to reverse the district court's refusal to grant relief from the judgment of March 26, 1984. For reasons stated below, we affirm.

II

By indictment returned in November, 1975, the United States charged that certain of the defendants named in the indictment, including Irvin Kovens, had operated the Marlboro Race Track through a pattern of racketeering activity in violation of 18 U.S.C. § 1962. Pursuant to the provisions of 18 U.S.C. § 1962(c) and 1963(a), the United States sought forfeiture of the interests of the named defendants in

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*The stock has been sold and Schwartz actually seeks recovery of the proceeds of its sale. For ease of explanation, however, this opinion will refer to the controversy as involving rights to ownership of the stock itself.

the Marlboro Race Track, including interests held in the form of SMAA stock. The Government contended that Schwartz held the stock as nominee for the true owner, Irvin Kovens, so that Kovens could avoid the effect of a restrictive covenant prohibiting him from owning an interests in a competing racetrack. Both Kovens and Schwartz claimed that Schwartz was the true owner.

A jury returned guilty verdicts against all defendants and found, by special verdict, that Kovens owned the stock through Schwartz as nominee. On October 7, 1977, a forfeiture order was entered ordering Kovens to forfeit his interest in SMAA. The order further directed all interested parties to show cause why the forfeiture should not become final.

On October 26, 1977, Schwartz filed a response to the show cause portion of the October 7 forfeiture order and a claim to ownership of the stock. On December 12, 1977, the district court ruled that Schwartz's claim to the stock should be addressed in a civil forfeiture proceeding by the assigned judge. The court ordered the stock placed in escrow with the clerk of the court pending further court order. Schwartz appealed to this court but we dismissed because the December 12 order was not final and appealable under 28 U.S.C. § 1291.

During 1979, this court issued three decisions, the net effect of which was to affirm the convictions of the Mandel defendants, including Irvin Kovens. United States v. Mandel, 591 F.2d 1347 (4th Cir.

1979), 602 F.2d 653 (4th Cir. 1979) (en banc), 609 F.2d 1076 (4th Cir. 1979) (en banc). The Supreme Court denied certiorari. Mandel v. United States, 445 U.S. 961 (1980).

On January 21, 1981, the judge assigned to handle the civil forfeitures ordered that the stock be forfeited but that the forfeiture be stayed while Schwartz pursued an administrative remedy in the form of a request for remission or mitigation of the forfeiture before the Attorney General. United States v. Mandel, 505 F. Supp. 189, 192 (D.Md. 1981). Schwartz's Petition for Remission or Mitigation of Forfeiture was denied by the Attorney General.

Schwartz filed a suit for declaratory judgment on February 20, 1981, seeking to assert his ownership of the stock. An

appeal from the order of January 21, 1981 was remanded by this court for consolidation with the declaratory judgment action.

Finally, in early 1984, the parties reached a settlement. The settlement agreement, dated February 2, 1984, allocated 60% of the disputed stock to the United States and 40% to Schwartz. Each party "relinquish[ed] any and all further claim of ownership and/or of a proprietary interest of any kind or character in the portion of the stock allocated to the other party."

On March 20, obviously unaware, and not advised, of the settlement agreement, the district court issued a pre-trial order. The order denied Schwartz's motion for a jury trial and for exclusion of the verdicts in the criminal trial, and placed the burden of proving ownership on Schwartz.

On March 26, 1984, the district court entered the order which is the judgment at issue in this appeal. "[H]aving been apprised by counsel for the respective parties that a settlement ha[d] been reached... respecting the appropriate division of" the stock at issue in this appeal and "having been provided with a copy of [the settlement agreement] dated February 2, 1984" and "recognizing that certain actions [were] necessary to implement the settlement" and "intending by its actions to give effect to the settlement", the district court ordered the clerk of the court, with whom the stock was in escrow, to make arrangements so that the liquidation value of SMAA would be distributed in accordance with the settlement, 60% to the United States and 40% to Schwartz. The order

further provided that the district court would retain jurisdiction over the matter until all actions necessary to effectuate the settlement had been taken.

In 1987 the Supreme Court decided McNally v. United States, 483 U.S. 350 (1987), rejecting the intangible rights doctrine. The Court held in McNally that the federal mail fraud statute did not make it a crime to defraud citizens of their intangible right to an honest and impartial state government. The Mandel defendants, including Kovens, had been convicted of mail fraud on the same intangible rights theory rejected in McNally, and mail fraud was used as a RICO predicate offense. Accordingly, the district court issued a writ of error coram nobis to all of the Mandel defendants vacating all of their convictions. U.S. v.

Mandel, 672 F. Supp. 864 (D.Md. 1987). The court found that McNally did not change the scope of the mail fraud statute, but merely announced that from its inception the statute had not protected the intangible right to honest government. Therefore, the Mandel defendants' conduct had never been, even at the time they were convicted, a violation of the mail fraud statute. Id. at 873, 875. As Schwartz asserts, the convictions were void ab initio. This court affirmed. United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989).

After three of the Mandel defendants moved to modify the order forfeiting their SMAA stock and to require the Government to repay the value of their forfeited stock, the United States agreed to repay them the value

of their forfeited shares. Irvin Kovens, however, was not among the three. To our knowledge, neither Kovens nor his estate has made any claim to the SMAA stock at issue in this appeal.

III

Schwartz instituted three separate proceedings seeking to recover the stock in light of the vacation of Kovens' conviction. Schwartz argues that issuance of the writ of error coram nobis rendered Kovens' RICO conviction and the RICO forfeitures based on it void ab initio; that the Government does not have, and never had, any right to keep the stock; that the Government holds the stock in constructive trust for the rightful owner, Schwartz; and that Schwartz should have relief from the settlement agreement and the judgment entered pursuant to it

because when they made the settlement both the Government and Schwartz mistakenly assumed that Kovens' RICO convictions were valid. All three proceedings requested relief from the district court's judgment of March 26, 1984 entered pursuant to the settlement agreement and the turnover to Schwartz of the 60% share taken by the Government under the settlement. The first motion argued that relief should be granted under Rule 60(b)(5) and (6); the second sought to add a claim for relief based on Rule 60(b)(4); and the third was a complaint for a declaratory judgment.

The district court denied relief in each instance and entered judgment for the Government in the declaratory judgment

action. Schwartz appeals each of the three decisions which we have consolidated on appeal.

IV

A.

We first discuss the claim that the Government holds the stock pursuant to a void RICO forfeiture. So far as Schwartz is concerned, the Government does not hold the stock merely pursuant to the judgment of forfeiture. The initial forfeiture was expressly conditioned on the failure of any interested parties to show cause why the forfeiture should not become final. The subsequent forfeiture order was stayed to allow Schwartz's challenge to it. Until the parties settled their dispute in early 1984, the stock was held in escrow by the clerk of court pending the outcome of Schwartz's

challenge to the forfeiture. It was in the face of Schwartz's declaratory judgment action in which Schwartz had sued the United States that Schwartz and the Government finally settled their dispute over the stock. In order to effectuate the terms of the settlement, the district court issued an order directing the clerk of court to make the necessary endorsements and delivery of the stock. The Government holds its 60% share of the stock pursuant to this order and the underlying settlement agreement, not only the RICO forfeiture order. Therefore, it is not sufficient for Schwartz to assert that the coram nobis writ rendered the RICO forfeiture order void ab initio. He also must seek relief from the settlement agreement and the March 26, 1984 order entered pursuant to it. Our attention,

therefore, will be given to Schwartz's request for relief from the 1984 settlement and order.

B. 60(b)(4)

Rule 60(b)(4) provides for relief from a judgment that is "void." "A judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter; or of the parties, or if it acted in a manner inconsistent with due process of law." 11 Wright and Miller, Federal Practice and Procedure: Civil § 2862 at 198-200 (1973).

Schwartz does not argue that the district court was without jurisdiction to enter the order at issue. Nor can we see a violation of due process, although he seems to assert that there was one. By his settlement with

the Government, Schwartz made a conscious choice, based on an informed weighing of the risks and benefits of further litigation, to forego the very procedures afforded to protect his right to due process. He had the right to try, in the declaratory judgment action, the question of ownership of his stock and gave up that right by the settlement. We will not entertain the suggestion that the order entered to enforce the consequences of this choice violates due process. See, e.g., Pitts v. Board of Educ. of USD 305, Salina Kansas, 869 F.2d 555, 557 (10th Cir. 1989).

C. 60(b)(5)

Schwartz also seeks relief from the 1984 judgment under the provisions of Rule 60(b)(5) and (6). The relevant parts of Rule 60(b) provide:

> On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Schwartz does not argue for relief under the first clause or Rule 60(b)(5), which provides for relief when "the judgment has been satisfied, released, or discharged."

The second clause of Rule 60(b)(5) provides relief from a judgment when "a prior judgment upon which it is based has been reversed or otherwise vacated." The application of this clause has been "limited to cases in which the present judgment is based on the prior judgment in

the sense of res judicata or collateral estoppel." 11 Wright and Miller, Federal Practice and Procedure: Civil § 2863 at 204 (1973).

The order disposing of the declaratory judgment case by agreement under the terms of the settlement was in no sense dependent for its validity upon the judgment of conviction of Kovens. The settlement was of a case concerning the very issue which is presented here, the ownership of the stock, and so far as Schwartz and the United States are concerned, that issue was determined by the settlement. Granting that the question of who owned the stock arose because of Kovens' conviction, the settlement of the question as between Schwartz and the United States did not

depend upon it, for if Kovens' conviction had been known to have been invalid at the time of the settlement, undoubtedly that factor would have been taken into consideration by the parties at that time, which it was not, else we would have had that argued also.

Finally, with respect to Rule 60(b)(5), Schwartz claims that it is no longer equitable that the order of settlement should have prospective application. No contention is made that the few duties required by the order were not immediately carried out, or that there is anything left to do under that order. See Gibbs v. Maxwell House, 738 F.2d 1153, 1155-56 (11th Cir. 1984) in which the court, in denying prospective application under Rule 60(b)(5) of an order of dismissal stated:

"That plaintiff remains bound by the dismissal is not a 'prospective effect' within the meaning of Rule 60(b)(5) any more than if plaintiff were continuing to feel the effects of a money judgment against him." We find Gibbs persuasive. The construction of Rule 60(b)(5) that Schwartz seeks, which apparently is to the effect that a judgment has prospective effect so long as the parties are bound by it, would read the word "prospective" out of the rule, which we decline to do. Such reading would open up to re-examination any judgment memorializing a settlement if in hindsight the settlement might seem inequitable. We do not think that the courts can function on such a basis. The vast majority of cases are settled as

everyone knows, and Rule 60(b)(5) simply cannot be read so as to expose each settlement to equitable re-examination.

Along this line, the argument that Schwartz had to settle because the pre-trial order of March 20, 1984 had decided questions with respect to trial by jury, burden of proof and admissibility of evidence against him, simply is contrary to the facts in the record. The settlement agreement is dated February 2, 1984, more than six weeks prior to the district court's pre-trial order of March 20, 1984. So Schwartz's argument has the order reversed.

D. 60(b)(6)

We are unaware of any case addressing the precise issue raised here: whether the district court abused its discretion in

refusing to grant 60(b)(6) relief, on the grounds of mutual mistake, from a judgment entered pursuant to a settlement agreement. But we find Ackermann, infra, persuasive, as did the district court.

In that case, the Court held that strategic decisions made during the course of litigation provide no basis for relief under 60(b)(6), even though with hindsight they appear wrong. Ackermann v. United States, 340 U.S. 193 (1950). After the district court had cancelled their naturalization certificates, the Ackermanns failed to appeal. Mrs. Ackermann's brother, Keilbar, in the same case, did appeal his cancellation, however, and succeeded in having the complaint against him dismissed. The Ackermanns argued that they were entitled

to relief under Rule 60(b)(6) from the judgment cancelling their naturalization. The Court rejected their argument in the following language:

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Id. at 198.

We find no meaningful distinction between a motion asking for relief from a decision not to appeal, as in Ackermann,

and one that asks for relief from a decision to settle, as in this case. The decision to settle a case is made in the same manner as any other decision with respect to the course of litigation, including a decision not to appeal. A litigant weighs the chance of success against the probable cost of achieving that success through further litigation, all based on whatever limited information is available at the time. Schwartz necessarily undertook such a cost-benefit weighing in 1984 when he decided to settle his challenge to the forfeiture. His was as calculated, free, and deliberate a choice as that of Mr. and Mrs. Ackermann, and as their's was not, he should not be relieved from it.

We think the district court did not abuse its discretion in refusing relief under Rule 60(b). McLawhorn v. John W. David & Co., Inc., 924 F.2d 535, 538 (4th Cir. 1991).

V

Finally, we address Schwartz's action for declaratory judgment, the appeal from the dismissal of which also is considered in this appeal. As in the 60(b) motions, Schwartz seeks relief from the March 26, 1984 judgment entered pursuant to the settlement agreement and a declaration that the United States holds the stock in question in trust for Schwartz. The district court entered judgment for the United States because it held res judicata the order entered on the settlement in the earlier declaratory judgment action filed

by Schwartz. We agree and affirm on the opinion of the district court. Schwartz v. United States, 745 F. Supp. 1132 (D. Md. 1990).

VI

We should add that we have added little to the various thorough and complete opinions of the district court under review here which it filed with respect to the ownership of the stock, and with all of which we agree. In many instances the district court's opinions address the questions at hand in more detail than have we. See Schwartz v. United States, 129 F.R.D. 117 (D. Md. 1990); Schwartz v. United States, 733 F. Supp. 235 (D. Md. 1990) and Schwartz v. United States, 745 F. Supp. 1132 (D. Md. 1990).

VII

We emphasize that we express no opinion on, and do not decide, any rights that Kovens' estate and the United States may have against each other concerning the ownership of the stock, or any rights that Schwartz and Kovens' estate may have against each other with respect to the same question. Our only decision is that, for the moment, as between Schwartz and the United States, the question has been determined.

VIII

We have not mentioned explicitly each of the plethora of arguments and sub-arguments made in Schwartz's brief, however we have considered all of them and are of opinion they are without merit.

The orders and judgments of the district court appealed from are in each case

AFFIRMED.